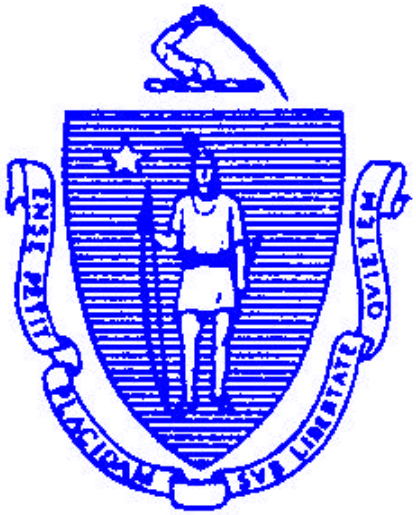
Commonwealth of Massachusetts

Department of Industrial Accidents

OFFICE of EDUCATION and VOCATIONAL REHABILITATION INFORMATIONAL MANUAL



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OFFICE OF EDUCATION AND VOCATIONAL REHABILITATION

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Office of Education And Vocational Rehabilitation Mission Statement

The mission of the Department of Industrial Accidents, Office of Education and Vocational Rehabilitation (OEVR) is to assist injured workers, who have accepted or established liability workers' compensation cases under G.L. c. 152, to return to meaningful employment through the delivery of vocational rehabilitation services. To qualify for these services an injured worker must have residual restrictions, due to their work related injury, that prohibit a return to his/her pre-injury job. The goal of vocational rehabilitation services (VR) delivered to injured workers, under G.L. c. 152 § 30G, is to return an employee to his/her pre-injury average weekly wage (AWW). OEVR is the overseeing authority for these services. It facilitates agreements to return workers to meaningful gainful employment with a focus on wage replacement. [1]

[1] The Director of the Office of Education and Vocational Rehabilitation (OEVR) will initiate additional changes, as necessary, to this manual via memoranda after the publication date.

The Director of the Office of Education and Vocational Rehabilitation (OEVR) will review the manual at the end of each fiscal year and make any changes necessary in accordance with the Act and the 452 Code Mass. Regs. 4.00 et seq.

OFFICE OF EDUCATIONAL AND VOCATIONAL REHABILITAION (OEVR)

INFORMATIONAL MANUAL

SUMMARY OF CONTENTS*

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OEVR INFORMATIONAL MANUAL

PART I

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I. INTRODUCTION AND PREFACE TO THE OEVR INFORMATIONAL MANUAL

Under the provisions of G.L. c. 152 and 452 Code Mass. Regs., there are three primary streams of benefits available for workers who have sustained an industrial injury. They are weekly indemnity benefits, the payment of medical expenses and vocational rehabilitation benefits.[2] Vocational Rehabilitation (VR) services have made substantial gains since the enactment of the 1991 statute. For example, there have been significant increases in returns-to-work (RTW), over five times the number placed into employment than were under the old law. Further, prior to December 23, 1991, 52 weeks of VR benefits were available. After December 23, 1991, 104 weeks of VR services are available to injured workers. The main objective of OEVR is to facilitate VR agreements and return injured employees to work.

This 2001 revised Informational Manual incorporates the changes and revisions in the OEVR Process that are presently being implemented as a result of a year long study conducted while revising the Regional Review Officers Manual and the Vocational Rehabilitation Providers Manual.

OEVR practices and procedures now more accurately reflect the statutory provisions in the 1991 Reform Act, the provisions in 452 Code Mass. Regs. §§ 4.00-4.11, and the case law by the reviewing board and the courts. Specifically, the most significant changes include modifications to eligibility requirements (see infra. at 10-15); an emphasis on the OEVR's concurrent jurisdiction to determine the employee's need for mechanical devices or prostheses under G.L. c. 152, § 30 (par 4) (see infra, at 22); clarification of the appeals process from OEVR's adverse determinations (see infra, at 35); and the availability of retroactive restoration of benefits in some cases where there is a 15% reduction (see infra, at 33).

This Manual is designed to be a useful working tool, so that judges, in making determinations or writing decisions, and attorneys, in aiding clients in navigating the OEVR process, will have a clearer understanding of the vocational rehabilitation benefits stream available to injured workers under G.L. c. 152.

[2] There are also death benefits and specific injury benefits. See G.l. c. 152, §§ 31, 32, 33, 36.

Part II of this Informational Manual discusses the practices, progression and procedures of the OEVR process with citations to relevant legal authority.[3] This will include discussion of the modifications and revisions to past practice.

Parts III, IV and V discuss OEVR's interactions with Dispute Resolution, the Trust Fund and OEVR's function in 15% reductions/suspensions respectively. Part VI of the Manual is comprised of controlling legal authority with citations to relevant sections, a Memorandum on provisions and revisions to the law, reproduction of 452 Code Mass. Regs. §§ 4.00-4.11; and texts of recent relevant case law.

The Appendices in Part VII include flow charts, graphically illustrating OEVR process; interactions with the Division of Dispute Resolution; an outline of OEVR's interaction with the lump sum process; as well as a listing of RRO Territories. The Appendices also include reproductions of OEVR's most recent forms. Many of the forms have been revised to synchronize them with the current state of the law. One form is entirely new. The detailed table of contents for the Appendices is set forth on pages 143,149,176,196 of this Manual.

Finally, the Exhibits appended at the very end of the Manual, give actual examples of final documents used to address some of the changed VR practices and procedures.

[3] All relevant legal authority in G.L.c. 152; 452 Code Mass Regs.; and the caselaw is reproduced in Section VI of this Informational Manual, beginning at page 48.

CONCLUSION

By bringing operations of OEVR in synchronization with the current law in G.L. c. 152; 452 Code Mass. Regs. § 4.00 to § 4.11; and case law, the public perception of fairness and due process, will be enhanced. The credibility and integrity of the system will increase public confidence that no one is being dismissed without consideration or that decisions are made by "whim." The clarification of procedures will ensure evenhandedness, the opportunity for due process, consistency in determinations and diminish challenges in the courts.

The Massachusetts implementation of VR provisions could make OEVR one of the strongest in the nation and a model to showcase to the country in providing necessary supports for the statutory goal of aiding employees' return to the workplace in conformity with the provisions of current Act, G.L. c. 152 and the current regulations in 452 Code Mass. Regs. §§ 4.00 – 4.11.

II. OPERATION OF THE OFFICE OF EDUCATION AND VOCATIONAL REHABILITATION (OEVR): THE VOCATIONAL REHABILITATION (VR) PROCESS

The Office of Education and Vocational Rehabilitation (OEVR), under the Director, has two major functions in the Department of Industrial Accidents. OEVR is responsible for educating the public in all aspects of the VR relevant workers' compensation law and for facilitating work returns, through the vocational rehabilitation process for those injured employees who cannot return to pre-injury employment.

A. DIRECTOR'S FUNCTIONS[4]

1. Manage all operations of OEVR, consisting of public information and Vocational Rehabilitation.

2. Implement, oversee and ensure that procedures are satisfactorily maintained for informing the public of all aspects of the workers' compensation VR benefits. This includes publishing yearly updates to the Regional Review Officers Manual, the Vocational Provider Manual and the Informational Manual.

3. Expedite VR process in the system, inclusive of certifying and regulating outside VR providers. See 452 Code Mass. Regs. § 4.03.

4. Review VR cases and authorize a 15% reduction in weekly compensation benefits when warranted. 452 Code Mass. Regs. § 4.09. See G.L. c. 152, § 30G.

5. Reinstate 15% reductions in accordance with 452 Code Mass. Regs. § 4.09, including retroactive restoration of benefits, where appropriate, after a hearing which provides for presentation of documents and oral testimony if necessary and if requested. See G.L. c. 152, §§ 30G, 30H.

[4] OTHER IMPORTANT participants in the OEVR process are Regional Review Officers (RROs); Disability Analysts; and Certified Vocational Rehabilitation Providers (VR Providers). Their functions are described below in the Appendices at 177,183,184.

6. Review cases to determine if VR consent to lump sum is appropriate. See G.L. c. 152, § 48; 452 Code Mass. Regs. § 4 .11

7. Prepare budget requests.

8. Monitor spending.

9. Train and evaluate all VR related staff.

10. Interview and select staff for all VR offices.

11. Please note that under 452 Code Mass. Regs. § 4.11, pursuant to G.L. c.152,. § 1(12), was amended on January 9, 2001 to provide that no RRO or the OEVR DIRECTOR shall be called to testify at any proceeding within the Division of Dispute Resolution regarding any vocational issue which has come before him as the Director or as the Vocational Review Officer.

B. BASIC CRITERIA
1. ELIGIBILITY: THE THRESHOLD

During the current revisions to the OEVR Manuals, (Regional Review Manual and Vocational Provider Manual), the eligibility criteria for VR benefits were reviewed in order to synchronize these criteria with the law in G.L. c. 152, the regulations in 452 Code Mass. Regs., and recent case law by the reviewing board and the courts. In light of the law there are now additional instances where it may be appropriate to continue, to reduce, suspend, or to terminate VR services. See 2001 Informational Manual, at 12, 48 et seq. (relevant legal authority). These revisions in eligibility criteria are among the most significant departures from prior practice in OEVR. More injured workers will now have the opportunity to be considered for vocational rehabilitation under the law.

Prior to this yearlong review (FY 2001), the linchpin of resolving eligibility determinations was whether or not an employee was receiving weekly indemnity benefits. However, to comport with the law, the *focus must not be on the receipt of weekly benefits, but on whether there is a work-related residual incapacity or functional limitation preventing an employee's return to suitable employment appropriate to the pre-injury average weekly wage, thus making VR services necessary and feasible.* See G.L. c. 152, §§ 30F, 30G; 452 Code Mass. Regs. §§ 4.01, 4.02, 4.05, 4.06. This modification of eligibility criteria is also supported by the design of related aspects of the Act, for example, as is provided in G.L. c.152, § 48, amended by St. 1991 §§ 74-75 (2 years eligibility after lump sums) or G.L. c. 152, § 30 (medical benefits only, but with residual incapacity preventing a return to former employment at an approximate average weekly wage). See also G.L. c. 152, § 8(2) (provisions for suspending or discontinuing weekly benefits, which may or may not result in suspension or termination of VR services, which are designed to enable an employee to re-enter the workplace).

Under the law, it is clear that termination of weekly benefits does not, in itself, make an employee ineligible for VR benefits in an established or accepted case. *Some circumstances, which may or not require VR under these revised eligibility criteria follow this section.* See "Effect Of Procedural Posture Of Case on OEVR Eligibility Criteria: Update" 2001 Informational Manual, at 12. The Determination of Suitability Form (DOS) and other forms have been revised to reflect these changes. These modified forms are also appended to this Manual. See 2001 Informational Manual, at 149.

In implementing the eligibility criteria in accordance with the statutory, regulatory and case law provisions, the Department and OEVR are conducting in-house training and making computer modifications so that information regarding the status or posture of the case is more readily available to those in the Office making VR determinations.

EFFECT OF PROCEDURAL POSTURE OF CASE ON OEVR ELIGIBILITY CRITERIA: UPDATE 2001

. The procedural posture of the case is very important to evaluate in order to assess eligibility. The following OEVR eligibility modifications will effectuate the law as it is presently enacted. Some examples of situations where an employee will be evaluated for vocational rehabilitation (VR) services under the modified eligibility criteria are:

1. Effect of Payment Without Prejudice

Generally liability does not attach where there is a unilateral termination in the pay without prejudice period. See G.L. c. 152, §§ 8 (1) and (6). (But see number 2, Ongoing Weekly Benefits, infra for potential VR eligibility in instances of a closed award during the pay without prejudice period).

2. Ongoing Weekly Benefits

Where there is an unappealed conference order[5] awarding benefits, liability is established and VR services may be appropriate if there is a residual impairment preventing a return to work at the former average weekly wage. Where there is an appealed conference order on the issue of liability, the VR process may begin, See G.L. c. 152, § 12(1) (conference order enforceable in Superior Court); 452 Code Mass Regs. § 4.05(1) (VR services may be appropriate where there is an order or decision by an administrative judge).

3. Appeals not Bearing on Liability

Where an appeal from an award of compensation is made only on the basis of the correct average weekly wage, the extent of incapacity, penalties, attorney's fees, coverage issues, or any other issue that does not bear on liability, there may be an entitlement to VR services.

[5] A party has 14 days from the filing of the conference order to appeal for a hearing pursuant to § 11. G.L. c. 152, § 10A (3). A party has 30 days from a hearing decision to appeal to the reviewing board. G.L. c. 152, § 11C. If there is no appeal on the issue of liability under either of these sections, liability is established.

4. Closed Period Benefit Awards

Where there is an award of compensation benefits for a closed period and no appeal pending, liability is established, and VR services may be appropriate. In the past, closed period award cases were evaluated as "not suitable" for VR. An employee's eligibility for services, after a closed award, could vary depending on the reason the employee has not sought further weekly indemnity.

EXAMPLES: A) There may be no appeal for strategic reasons and the employee may want VR so s/he can return to the labor market.

B) There could be updated medical information making a difference in the employee's residual work related incapacity picture.

C) If a judge's determination, in a hearing decision, makes it clear the employee is no longer incapacitated in any way, VR would be precluded. (But see number 5, Deteriorating Work Related Conditions, infra).

5. Deteriorating Work Related Conditions

Where an employee has full capacity to work and no residual impairment, that employee is not eligible for VR services. However, because of the mutability of the human situation, an employee may become eligible for VR services at a later date if the established liability work related medical condition deteriorates. See G.L. c. 152, § 16.

6. Discontinuances

Where there is a discontinuance and liability was established but an employee has a residual impairment, there may be entitlement to VR services depending on the RRO's assessment.

EXAMPLE: This may occur where updated medical information becomes available following the litigation that indicates a recurrence of the work injury. See G.L. c. 152, § 8 (2)(a).

7. After Benefits Are Exhausted

Where an employee has exhausted entitlement to weekly benefits under G.L. c. 152, §§ 34 or 35 and there is a residual impairment, VR benefits may be appropriate where liability is established. See G.L. c. 152, § 8 (2) (g). In the past, most of these cases were deemed "not suitable."

EXAMPLE: There are no permanent partial benefits in G.L. c. 152. Therefore, where §§ 34 or 35 benefits are exhausted and an employee is not permanently and totally incapacitated (§ 34A), VR may be appropriate.

8. Unsuccessful Return To Work Efforts

Where there is an unsuccessful attempt to return to work, VR services may be available. See G.L. c. 152, § 8 (2)(c).

9. Employer Termination After A Return To Work

Where an employer terminates an employee's job because of mental or physical incapacity to perform the job duties, there may be entitlement to VR services. See G.L. c. 152, § 8 (2)(d). Moreover, if an employee is fired by the prior employer, within 12 months of a return to work, there is a presumption that the employee is physically or mentally incapable of performing the duties required or the job is not suitable. G.L. c. 152, § 8 (2)(c)(d)(last paragraph).

10. Modified Work Now Unavailable

Where liability is accepted or established and the employee returned to work in a modified job not generally available on the open job market at his average weekly wage (AWW) (or approximate AWW), but the job becomes unavailable, VR services may be appropriate.

11. Impact of Lump Sum Settlement

If there has been a lump sum where liability is established for a post –1991 case, there is a 2-year period from the date of the lump sum to file for VR services unless there is a new claim filed. G.L. c. 152, § 48(2). For injury dates between 1986 and December 23, 1991, an employee may seek VR services at any point after a lump sum settlement. See G.L. c. 152, § 48; St. 1987, c. 691, § 12; St. 1986, c. 662, § 36. In pre-1986 cases, entitlement to VR services is redeemed by a lump sum settlement. See St. 1985, c. 572, § 52; St. 1987, c. 691, § 12. Prior to a lump sum settlement, an employee may seek or a judge, or an insurer, may refer an employee to OEVR for vocational services at any point that it seems warranted once liability is established. See G.L. c. 152, §§ 30G, 30H

12. Award Of G.L. c. 152, § 34 A Permanent And Total Benefits

Where a judge has ordered permanent and total weekly compensation benefits under G.L. c. 152 § 34A, an employee may still be entitled to VR benefits. Atherton v. Steinerfilm, Inc., 11 Mass. Workers' Comp. Rep. 114 (1997).

The foregoing is a nonexhaustive list meant to illustrate possible cases or situations where eligibility for VR services may arise as a result of the reassessment of eligibility criteria.

2. BASIC CRITERIA: NECESSITY AND FEASIBILITY DETERMINATIONS

As noted above, VR services are appropriate where there is a work-related residual incapacity or functional limitation preventing an employee's return to suitable employment appropriate to the pre-injury average weekly wage (AWW), thus rendering VR services necessary and feasible. See G.L. c. 152, §§ 30F, 30G; 452 Code Mass. Regs. §§ 4.01, 4.02, 4.05, 4.06.[6] Following the threshold issue of eligibility, the questions of necessity and feasibility must be evaluated.

a. NECESSITY

In determining the "necessity" of rehabilitation, it is the responsibility of a Regional Review Officer (RRO)[7] to consider the circumstances in which an employee cannot return to his or her former job without modification or to another job without retraining, because of the residual work related limitations. 452 Code Mass. Regs. § 4.02 (8).

b. FEASIBILITY

In determining the "feasibility" of VR, the RRO is required to consider the practicality of recommending VR services with respect to the cost-benefit ratio of the services; the possibility of a return to function; the duration of future employment; and the pre-injury AWW. 452 Code Mass. Regs. § 4.02 (4).

[6] As noted above, all relevant texts of the legal authority are reproduced in Section VI of this Manual, at 48.
[7] The functions of a RRO are set forth in the Manual at 185.

c. DOCUMENTATION

In assessing "necessity" and "feasibility," the RRO must have documentation of a functional limitation (i.e. the residual work related effect of physical or psychiatric injury or occupational disease) and medical documentation indicating some work capacity. See 452 Code Mass. Regs. § 4.02 (5).

d. RECEIPT OF WEEKLY BENEFITS IRRELEVANT

As noted above, in accordance with the law, necessity and feasibility determinations may be made without reference to whether or not an employee is receiving weekly benefits, as was the past practice prior to the modifications in eligibility requirements. See supra, at 10-15.

C. OEVR PROCESS

1. REFERRALS TO OEVR

G.L. c. 152, § 30F, § 30G
452 Code Mass. Regs. §§ 4.05, 4.09(1)

GENERAL COMMENTS

The Regional Rehabilitation Review Officers (RRO) are assigned by Regions from which all referrals are gleaned. See RRO Office list in Appendix C, at 187. The RRO is responsible for interviewing all referrals that come out of his/her individual region. Once the referral becomes an interview, the RRO of file monitors the VR case, even if the client moves out of the regional area after the interview takes place. Referral sources include employees, attorneys, certified providers, physicians, insurers, or DIA judges. Any party having an interest in seeing that an injured worker receive his/her vocational rehabilitation benefits, to which s/he is entitled under G.L. c. 152, § 30F, may make a referral at any time. Those individuals making referrals to OEVR may utilize the OEVR referral form. Most referrals are seen within two to four weeks in order of priority.

a. Parties referring employees for VR may do so by sending a written letter with the employee's name, address, DIA number, current medical information, (i.e. within six (6) months), and any other data pertinent to the employee's injury history. The RRO receiving the referral may send the referring party OEVR's Referral Form if additional information is necessary. The OEVR referral form is to be used, as a guide, to show the person referring what type of information is required by OEVR. See 2001 Informational Manual, at 154. (Referral Form reproduced).

b. In the case of insurers, referrals to OEVR may be made every six (6) months. G.L. c. 152, § 45. It should be noted that in new Act cases (post- December 23, 1991), the insurer has a 180 day "pay without prejudice" period which may be extended for a further 180 days. G.L. c. 152, § 8(1)(4)(5). During this time, a referral is not appropriate, because liability has neither been accepted nor established. An insurer may, however, voluntarily provide VR services even within the "pay without prejudice" period before liability has been accepted or established. G.L. c. 152, § 30E.

c. Judges at the DIA may refer injured employees to OEVR for VR services. See OEVR Referral Form appended to this document at 153. OEVR, however, has the final authority to determine whether VR is necessary to return an employee to suitable

employment at an appropriate AWW. See Perry v. Cape Cod Hosp., 9 Mass. Workers' Comp. Rep. 43 (1995); Raposo v. William Wetmore Co., 9 Mass. Workers' Comp. Rep. 30 (1995); See also Oriol v. L G Balfour Co., 14 Mass. Workers' Comp. 295 (2000). (All cases reproduced in Part VI of this Manual).

d. It is important to note that, at any time, a voluntary agreement between an injured employee and the insurer(s) may provide for VR services to be initiated. G.L. c. 152, § 30E; 452 Code Mass. Regs. § 4.05(1); 452 Code Mass. Regs. § 1.05(2); See G.L. c. 152, § 19(1); See also 452 Code Mass. Regs. § 4.05(1)(a) – (c) (Time Tables for OEVR contact of employee).

e. Please note that in post – December 23, 1991 cases, there is a two-year window after a lump sum agreement for a referral to OEVR. G.L. c. 152, § 48, as amended by St.1991, § 74A. For purposes of G.L. c. 152, § 2A, this section is substantive. St. 1991, § 106. See Jones' Case, 2 Mass. Workers' Comp. Rep. 265 (1988). For cases prior to December 23, 1991, there is no time limit for an OEVR referral. See G.L. c. 152, § 48, as amended in St. 1986, c. 662 and St. 1987, c. 691, § 12. In pre- December 23, 1991 cases, 52 weeks of VR services are available. In post December 23, 1991 cases, there are 104 weeks of available services. G.L. c. 152, § 48 as amended by St. 1991, § 74A.

2. INFORMATIONAL MEETING

After referral, the informational meeting is conducted by an OEVR Regional Review Officer (RRO). This meeting is not mandatory, but it assists the employee in understanding what VR benefits are available under the law. The RRO explains the VR process, the prerequisites necessary for eligibility, and the procedures that must be followed.

An informational handout entitled, VOCATIONAL REHABILITATION – DON'T SETTLE FOR LESS, is utilized and given to the injured worker as a reference guide to aid in determining whether he/she is presently eligible for such services or may be in the future. This handout has been revised to reflect the modifications in eligibility criteria and is reproduced at 146 of this Manual. An informational meeting generally takes approximately thirty to forty minutes. It is usually conducted by an RRO in person or, occasionally, on the phone.

The Basic Interview Form used at the informational meeting has also been revised and is reproduced at 159 of this Manual.

3. MANDATORY MEETING

G.L. c. 152, § 30G
452 Code Mass. Regs. §§ 4.05, 4.06, 4.09

GENERAL COMMENTS

This meeting is, as indicated by its name, the first required meeting between OEVR and the injured employee and is a direct result of the referral process. G.L. c. 152, § 30G; 452 Code Mass. Regs. §§ 4.02, 4.05. The RRO assigned to the case will conduct the interview at the local VR office. It takes approximately 40 minutes. This meeting takes place in person, unless a telephone interview is appropriate where a client is out of state or has a severe medical condition.

a. INFORMATION DISSEMINATED

During the interview, the RRO explains the VR process including such issues as eligibility, determination of suitability, employment objectives, 15% reductions and OEVR's role in monitoring the case. The employee's questions will be answered and a brief handout, entitled, VOCATIONAL REHABILITATION – DON'T SETTLE FOR LESS, again explains VR services for which the employee may be eligible from job placement to retraining. This handout has been revised to reflect the modification to eligibility criteria discussed above in Part II, supra section B(1), at 10 (i.e. deletion of requirement that a employee be receiving weekly benefits to be eligible for VR). See Handout, at 146.

b. INFORMATION GATHERED

In addition to informing injured workers about the VR process, the Mandatory Meeting (MM) enables the RRO to determine whether VR services are "necessary" and "feasible" (see definitions and discussion Part II, supra section B (2), at 16. Information gathered at the MM to be considered includes, but is not limited to: functional limitations; employment history; transferable skills (combination of learned behavior, natural talents, and work-related skills which can be adapted from one work setting to another); work habits; vocational interests; pre-injury earnings; financial needs; and medical information. G.L. c. 152, § 30G; 452 Code Mass. Regs. §§ 4.02, 4.05.

c. GOAL

At the MM, the employee is encouraged to exhaust efforts to return to work with the pre-injury job or if possible, a goal and is in said job modified to his/her residual impairments. The RRO will review any job offer where appropriate to determine if said offer is bona fide. If the employee's functional limitations or the constraints of the local labor market preclude this, the participants shall establish a goal appropriate to the information gathered at the MM listed above (i.e. AWW, transferable skills, etc.). 452 Code Mass. Regs. §§ 405(2), 4.07(3). Where an employee requires an English language program it is OEVR's responsibility to order it. Oriol v. LG Balfour Co., 14 Mass. Workers' Comp. Rep. 295, 279 n.5 (2000).

The interview form for the MM is placed in the RRO's case file and copies are sent to the board file or the AJ or ALJ handling the case file. This form and related letters are reproduced in this manual in APPENDIX A, at 154-161.

d. PROSTHESIS OR OTHER MECHANICAL DEVICE

In the course of a Mandatory Meeting (or a Team Meeting [8] or another part of the OEVR process), the issue of whether an employee needs a prosthesis or other mechanical device may arise prior to participation in VR. In fact, such a need may be identified before, during or after VR services have been received. See G.L. c. 152, § 30 (par. 4). Paragraph 4 of G.L. c. 152, § 30 has been an underutilized section. It provides:

> In any case where an administrative judge, the reviewing board, *the office of education and vocational rehabilitation* or the health care services board *is of the opinion that the fitting or an employee eligible for compensation with an artificial eye or limb, or other mechanical appliance, will promote his restoration to or continue him in industry, it may be ordered that such employee be provided with such item, at the expense of the insurer.* The provisions of this section shall be applicable so long as such services are necessary, *notwithstanding the fact that maximum compensation under other sections of this chapter may have been received by the injured employee*. (Emphasis added).

(1) As quoted above, an administrative judge, the reviewing board, *OEVR,* or the health care services board have concurrent jurisdiction in determining that an employee would benefit from a necessary mechanical appliance to promote restoration to or continuation in the workplace. Enforcement of G.L. c. 152, § 30 (par. 4) will bring the Department in consonance with the ADA and the goal of giving the required essential support to employees with residual physical incapacities to enable him/her to perform the essential functions of a job. Note that this statutory

[8] A Team Meeting is a special meeting with OEVR, inclusive of all parties involved in the VR services being administered. 452 Code Mass. Regs. § 4.02.

provision applies *whether or not the maximum weekly compensation under other sections of the Act are exhausted* (e.g. no further entitlement to weekly benefits). See Stevens v. Northeastern Univ., 11 Mass Workers' Comp. Rep. 167 (1997); G.L. c. 152, § 30. RROs have been trained and are now sensitive to the provisions in § 30.

(2) To formalize these procedures for implementation, the Director of OEVR has developed a document or "DETERMINATION FORM" to be utilized by the RROs in OEVR. If the RRO determines a prosthesis or a mechanical appliance(s) are necessary to aid in a return to the work place, the employee's position will, thus, be fortified by this "Determination." If the insurer resists, then the employee may file a claim for § 30 in the Division of Dispute Resolution using OEVR's § 30, paragraph 4 Determination as a basis for the claim. If a judge in that Division upholds the determination, immediate enforcement is available in the superior court under G.L. c. 152, § 12. It is to be noted that an expedited appeal (to a conference, etc.) from an insurer's refusal to pay for required VR services is available on the basis of hardship. G.L. c. 152, §§ 10 (2)(C). See forms 131, 132, at Appendix A, at 173,174.

(3) The DETERMINATION FORM, which is an entirely new form as of FY 2002, is reproduced in this Manual in Appendix A, at 172. Note that the RRO's jurisdiction to determine the need for a prosthesis or mechanical device does not come under the VR provisions in G.L. c. 152, §§ 30G, 30H, but rather under the G.L. c. 152, § 30, medical benefits section of the Act. Thus, an employee need not be enrolled or participating in vocational services to obtain a § 30 paragraph 4 determination for prostheses, mechanical device(s) or appliances. See Trust Fund Cases, at 26 (discussing Trust Fund involvement).

The Mandatory Meeting Form has been revised to reflect that the RRO may determine the need for a prostheses or other mechanical device pursuant to § 30 (par. 4) (as well as adding the possibility of retraining). The reviewing board cases relevant to § 30 are reproduced in this Manual, in Section VI, at 62.

e. REFUSAL TO ATTEND MANDATORY MEETING

Where an employee refuses to attend a Mandatory Meeting, after a second notice, the employee's weekly compensation benefits will be suspended or reduced. See G.L. c.152, § 30G; 452 Code Mass. Regs. § 4.09(1). OEVR will send a written communication to the insurer under G.L. c.152, § 8(2)(f) authorizing the suspension or reduction of weekly benefits.

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Thereafter, reinstatement of weekly compensation benefits will occur only after the employee attends a Mandatory Meeting appointment. G.L. c. 152, § 30G. The Regional Review Officer will then instruct the insurer to reinstate weekly benefits via a reinstatement letter.

The reinstatement of weekly compensation benefits is not retroactive unless a § 30H appeal informal hearing is conducted and the Director of OEVR or the Commissioner determines the failure to attend was justified. This occurs rarely, but the necessity of such a procedure finds support from the Appeals Court's recent decision in Doyle v. Department of Indus. Accidents, 50 Mass. App. Ct., 42, 44, 46 (2000) (discussing fundamental due process).

Within the last year, only one informal § 30H appeal hearing was conducted on retroactive reinstatement of a 15% reduction of weekly benefits. See Appendix C, Exhibit 3 (findings and rulings).

f. The Appeals Process from termination or suspension of benefits is further discussed below at 35.

4. DETERMINATION OF SUITABILITY (DOS)

G.L. c. 152, § 30G
452 Code Mass. Regs. §§ 4.02, 4.05(2), 4.06

GENERAL COMMENTS

As qualified vocational rehabilitation specialists, the RROs base their determination of suitability on an assessment of all the medical information available as well as the Mandatory Meeting (initial required interview) information. The final decision regarding the necessity and feasibility of VR services for the particular employee is made in accordance with 452 Code Mass. Regs. § 4.05(2). The RRO fills out the DOS Form, which can be broken down into the following categories. See (discussion of revised DOS Form below at 27). Each category requires a timely response.

(a) DOS of Suitability. DOS sent out within two days of interview.

(b) DOS of Not Suitable. VR case file is closed. DOS sent out within two days.

(c) Inability to Determine. Request for Vocational Assessment/Medical Information is to be received within 30 days. If no new information is received, the DOS decision is made based on the information on file.

(d) Re-consideration of a DOS Decision. The re-consideration must be accompanied with current data as the basis for reconsideration.

a. DOS FORM

The DOS form is sent to all parties (i.e. insurers, providers, attorneys, and employees) and is entered into the DIA Data System. If suitability has been determined, the case becomes an open, active vocational file within OEVR. The insurer is notified that it must refer the case to an OEVR certified VR Provider.[9] The Provider is responsible for developing an appropriate Individual Written Rehabilitation Program (IWRP). See 452 Code Mass. Regs. § 4.07. If necessary, the RRO facilitates this process by assisting all parties in Team Meetings and/or assisting in reaching an agreement on an IWRP. G.L. c. 152, § 19; 452 Mass. Regs. §§ 4.02, 4.07.

[9] Vocational Rehabilitation Services are rendered by organizations approved by OEVR rendered by organizations approved by OEVR as qualified providers. 452 Code Mass. Regs. § 4.03(1).

Once all parties agree to the IWRP, the RRO signs it and it becomes a viable contract that is part of the board file. THE RRO CONTINUES TO MONITER each active case file until successful completion of the IWRP and/or successful employment compatible with the IWRP for a minimum of sixty (60) days. 452 Code Mass. Regs. § 4.02. The RRO then completes a Closure Form. See discussion of VR Case Closure Procedures, infra, at 42. See also Closure Form in Appendix A, at 164 .

b. 15% REDUCTIONS

At any point in the VR process, a 15% reduction in weekly benefits can occur when an employee refuses or becomes non-participatory in VR services after being deemed suitable. G.L. c. 152, § 30G. These 15% reductions and avenues of appeal from them are discussed below at 33.

c. NON-SUITABILITY AND FURTHER REFERRALS

In the case of a non-suitability determination, the case file remains inactive or closed, generating no further activity by OEVR. Because of further research, an appealed conference order or the issue of liability no longer generates an automatic non- suitability determination. See supra, at 12 (2) ; infra, at 27 (g). An insurer, however, may refer an employee back to OEVR for a new DOS in six months. G.L. c. 152, § 45 The employee may also self-refer whenever there is a change in vocational or medical status. A judge at the DIA may refer an employee whenever it seems that VR services may be useful at anytime. The Department Referral Form is reproduced at 154.

d. FURTHER RESEARCH

Some cases require further research into vocational and medical issues to assess suitability.

e. TRUST FUND CASES

Occasionally VR cases become Trust Fund VR cases if the insurer refuses to fund the development and implementation of an IWRP program and instead OEVR pursues implementation of the IWRP and selects a VR provider. The Trust Fund then pays on the resistant insurer's behalf. If the Trust Fund is required to pay for the IWRP and VR services, upon successful completion and return of the employee to work, the resistant insurer *shall be assessed no less than twice the costs incurred.* G.L. c., 152, § 30H.

If successful completion of an IWRP also depends on G.L. c. 152, § 30 (par.4) appliances or devices and such a determination is part of the IWRP, then arguably, the

Trust Fund would be required to cover the cost, with the insurer remaining liable for a penalty of no less than twice the cost upon successful completion of the program.

Prior to assessing the Trust Fund, where there was insurer resistance to payment, OEVR previously required that there be a 10% functional impairment and a $400.00 average weekly wage. There is nothing in the statute or the regulations requiring that threshold. Former personnel inserted it. All Manuals have deleted that language in conformity with the statute. G.L.c. 152, § 30H; G.L.c. 152, § 65. The resistant insurer is fined a minimum of two times the cost of the program after successful completion of the IWRP. The insurer may contest any aspect of the assessment with the division of dispute resolution. G.L. c. 152, § 30H. The employee shall not be a party to the proceedings. Id.

Injured workers of uninsured employers also become Trust Fund VR cases. OEVR monitors the VR as with any other insurer. See infra, at 37. (further discussion of Trust Fund).

f. LUMP SUM

If an employee is deemed suitable and executes a lump sum agreement, the employee may request VR services within two years of the perfection of any settlement in post-December 23, 1991 cases; G.L.c. 152, § 48, as amended by St. 1991, § 74A. For purposes of G.L. c. 152, § 2A, this section is substantive. St. 1991, § 106. See Jones' Case, 2 Mass. Workers' Comp. Rep. 265 (1988). A lump sum agreement "shall not" redeem liability for the payment of medical benefits or vocational rehabilitation benefits with respect to such injury, unless the injury date precedes 1986. G.L. c. 152, § 48 (2). Compare St. 1985, c. 572 § 52 with St. 1987, c. 691, § 12. See infra, at 39 (further discussion of lump sums).

g. REVISED DOS FORM

The DOS Form has been modified to reflect that receipt of weekly benefits is no longer a pre-requisite to eligibility for VR services. See Part II, section B(1), supra at 10-15 (discussing modified eligibility criteria in compliance with the law). It also indicates the parties'right (i.e.employee/insurer) to appeal the DOS determination to the Commissioner under G. L. c. 152, § 30H.

Avenues of appeal from OEVR determinations are discussed below in Section 7, at 35. The revised DOS Form is reproduced in this Manual in Appendix A, at 161.

The DOS form has also been modified , effective November 1, 2002, to reflect that following an appealed conference order on the issue of liability, a claimant may begin the VR process in accordance with G.L. c. 152, § 12 and 452 Code Mass Regs.§ 4.05(1). This was modified after dialogue with the judges and further research.

5. IWRP DEVELOPMENT/ IWRP PROCESS/TEAM MEETING REQUEST

G.L. c. 152, § 30H
452 CODE MASS. REGS. §§ 4.07, 4.08

GENERAL COMMENTS

The IWRP is the source document for the client's vocational rehabilitation program. It indicates the vocational goal, services, the time necessary to reach the goal and a signature agreement on these issues. The Regional Review Officer's (RROs) role is to review this process to assure that appropriate services are delivered cost-effectively. Furthermore, the RROs monitor, review and evaluate the IWRP process in order to facilitate, and expedite suitable work returns.

The IWRP is likely to be an employee's only VR program. By law, vocational rehabilitation is only offered once to each injured worker. Once VR is utilized by the injured worker, he/she cannot request additional VR services. 452 Code Mass. Regs. § 4.08. Although the IWRP can be amended, there is a strict requirement that it must not exceed a two-year period after which the client would have exhausted his/her VR benefits. It should be further noted that in pre-December 23 1991 VR cases, the injured worker is entitled to only 52 weeks of VR services. In post-December 23 1991 injuries, the individual employee is entitled to 104 weeks of VR services. G.L. c. 152, § 48, as amended in St. 1991, § 74A. Prior to 1986 a lump sum closed out all rights to weekly, medical and vocational benefits. Any employee in a pre-1991 case with an injury date after 1986, can request services anytime after a lump sum of their case. See Citations, at 15,19, 27. An employee in a post-1991 case has two years after a lump sum to request VR services.

The IWRP should be submitted in a timely manner once the vendor and client agree on a vocational goal and the IWRP identifies the services necessary to achieve that goal. The IWRP is sent to the insurer for a signature. The insurer has ten (10) days to review the plan after it is received. G. L. c. 152, § 30H.

It is the responsibility of the VR provider to assure the IWRP is sent by the carrier to OEVR. If the IWRP is not sent by the insurer, despite provider efforts, then the RRO should contact the carrier to request the plan directly.

Normally, two to three months are sufficient to develop a sound IWRP. The RRO monitors this time period to ensure the timely plan development. If there are delays in the IWRP development, the RRO contacts all parties to assess the situation and hold a team meeting. In such meetings, the RRO reinforces the client's understanding that refusal to participate on his/her part could result in a 15% reduction in weekly compensation checks. After ninety days, the provider must send a letter explaining why no IWRP has been developed.

In special situations, RROs may grant verbal approval on an IWRP. A faxed copy is received and reviewed to insure that it meets the requirements for approval. The RRO informs the provider of verbal approval. The provider must send the original plan executed with all original signatures, within two weeks. If the IWRP is not received, the provider can not continue to provide vocational rehabilitation services. However, if there are extenuating circumstances, the provider should contact the RRO and request an extension.

a. IWRP GOAL

> In establishing the employment goal of the IWRP, after the DOS, the participants shall give priority to returning the injured worker to employment with the pre-injury employer in the pre-injury job modified to accommodate the employee's residual impairments as this is the most expeditious and cost-effective process. If this is not possible, because of the employee's functional limitations or constraints of the local labor market, then participants must establish an employment goal appropriate to the pre-injury wages, transferable skills, and employment history. 452 Code Mass. Regs. § 4.08(3).

b. VOCATIONAL SERVICES

Vocational services set out in the IWRP may include, but are not limited to:

(**a)** vocational assessment**;**
(b) work evaluation;
(c) job analysis;
(d) job modification;
(e) vocational counseling;
(f) job placement and follow-up;
(g) on the job training; or
(h) retraining.

452 Code Mass. Regs. § 4.08(2).

These services coincide with OEVR's "hierarchy" set out in the IWRP which is reproduced here in APPENDIX A, at 162.

c. CHANGES IN THE IWRP

Insurers are not responsible for multiple VR programs, but at any time, if there is a significant change in the life circumstances of the injured employee, such as a medical reversal, the IWRP shall be amended, suspended, or terminated on a case by case basis, with approval by OEVR. 452 Code Mass. Regs. § 4.08(1).

d. AGREEMENT

The insurer may provide funding for the development and execution of an IWRP plan at any time by agreement with the employee. See G.L. c. 152, § 19; G.L. c. 152, § 30E.

e. USE OF TARGETED LABOR MARKET SURVEYS IN THE IWRP PROCESS

(1) AVOIDING THE CREATION OF DAMAGING LABOR MARKET SURVEYS AND EARNING CAPACITY EVALUATIONS

It is important that practitioners and judges be aware of the possible use of Hypothetical Labor Market Surveys in litigation over earning capacity issues.

(a) General Laws c. 152, § 35D(5) provides that the fact an employee has "enrolled" in or is "participating" in a VR program paid for by the insurer or the Trust Fund shall not be used to support the contention that the employee's compensation rate should be decreased by the assignment of an earning capacity in any proceeding under this chapter. See G.L. c. 152, § 35D(5). (Text in Part V (B),

at 52-53). The Terms "enrolled" or "participating" in a "vocational rehabilitation program" are not defined in G.L. c. 152 or in 452 Code Mass. Regs. These terms may be clarified by a Circular Letter or in the Regulations.

(b) Although there is no case law on the subject, an employee is *arguably* protected from the assignment of an earning capacity as "enrolled" or "participating" in a "vocational rehabilitation program" under § 35(D)(5) at all stages of the development of the IWRP from the time of a Determination of Suitability (DOS) or perhaps even at first the Mandatory Meeting.

(c) The introduction of Hypothetical Labor Market Surveys (LMSs) into evidence before the Division of Dispute Resolutions in an earning capacity dispute, may raise serious foundational and evidentiary problems because these reports are generated without seeing the individual employee and tend to be very general without targeting the specific skills, attributes and abilities of the employee in question. See Canavan's Case, 48 Mass. App. Ct. 297 (1999) (discussing foundational issues where there is not particularized knowledge of an individual situation under test in Daubert, 509 U. S. 579 (1993) (Canavan's Case is reproduced in Part VI (E), at 136)). See also below, at (6) on 32.

(d) It is important to note that many administrative judges find that LMSs convey very little because they often do not identify *actual* skills (versus theoretical skills an employee might acquire in a certain job title) of a particular injured employee. If a LMS is allowed into evidence in a particular case, it would go to the "weight" of such information and therefore, the DOS could be offered into evidence, as well, to counter any weight that may be given to the former.

(2) PRE-IWRP

Due to the current lack of definition to the terms "enrolled" or "participating" in a "vocational rehabilitation program" in § 35D(5), VR providers have been instructed by OEVR to be conservative and precise, as opposed to overly general, in assessing the employee's skills and abilities at each stage of a vocational plan. What follows is the OEVR prescribed approach at each VR planning stage.

If there is a transferable skill analysis, it must be recorded by OEVR certified providers in such a way as to avoid the appearance of a Hypothetical Labor Market Survey (LMS). The employee's *actual skills*, learned through training, education, or job performance (as opposed to theoretical skills that an employee may be assumed to possess because of having been a member of a certain occupation) should be considered. If a client's transferable skills can be utilized in other occupations, the potential occupation should be recorded by industry titles and not by

specific job titles (e.g. skills are in the ***general*** medical, clerical, manufacturing field). It is important that certified providers be general in the pre-IWRP process and to be more specific regarding vocational goals as more data is collected. There are no LMSs to be done at this stage.

(3) DURING THE IWRP

Once an employee has received a DOS and is involved in the development of an IWRP, Exploration of Vocational Alternatives are performed ***only*** to justify the specific vocational goal recorded agreed upon in the IWRP in terms of the demand for the job in the employee's geographical area and to show marketability. LMSs can be performed to help determine the viability of the vocational goal selected for the IWRP. Providers should record, in a narrative form, only goal specific details in the IWRP (not in progress reports). This specific goal intensive approach avoids the appearance of a Labor Market Survey which is too general and not precisely targeted to an individual employee.

(4) EFFECTUATION OF THE IWRP

Once the IWRP is signed by all necessary parties, there is no need for further LMSs.

(5) PROVIDERS OF HYPOTHETICAL LABOR MARKET SURVEY

Where providers have improperly performed a LMS, once an employee is "enrolled"or "participating" in a "vocational rehabilitation program" paid for by the insurer, they may be subject to the provisions of § 4.04. Any certified Provider who performs Hypothetical Labor Market Surveys and earning capacity evaluations ***shall*** be prohibited from providing VR services to the same injured employee. 452 Code Mass. Regs. § 4.04 (3).

(6) In Caldwell v. Fleet Financial Group, Inc., 15 Mass. Workers' Comp. Rep._____(May 9, 2001), the reviewing board ruled that labor market surveys, in so far as they are hearsay, are not admissible to prove the truth of the matters therein. See below, at 136 (discussing cases).

6. 15% REDUCTIONS

G.L. c. 152, § 30G, § 30H
452 Code Mass. Regs § 4.09(2), (3)
G.L. c. 152, § 8(2)(f)

GENERAL COMMENTS

At any point in the VR process when an injured worker has been deemed suitable for vocational rehabilitation services, and the employee continues to receive weekly benefits, a 15% reduction in weekly compensation can occur. The insurer may petition the director of OEVR to request a 15% reduction on an individual case if the client either refuses VR services or is not participating in the VR process. The Director, or appointed person assigned by the Director, will contact the certified provider for assessment, the RRO involved in the case, and will review the file.

a. TEAM MEETING

If appropriate, the RRO will schedule a Team Meeting with all parties whether an IWRP is in place or is in the process of being developed, in order to facilitate an agreement about the VR process prior to making a recommendation to the Director to reduce 15% in benefits, restore full benefits, or to continue the 15% reduction. 452 Code Mass. Regs. § 4.09.

b. RECOMMENDATION

The RRO then prepares a summary of the case file events and recommends whether a 15% reduction is or is not warranted. The Director then responds in writing to the insurer. A timely response from the RRO is necessary in order for the Director to respond to the insurer's request for 15% reduction within a two week time frame from date of receipt of the 15% request from the insurer. 452 Code Mass. Regs. § 4.09.

c. REINSTATEMENT

The employee will receive reinstatement of full benefits if s/he can demonstrate active resumption of services or justify, to the satisfaction of OEVR, the appropriateness of the refusal. 452 Code Mass. Regs. § 4.09(3).

d. NOTIFICATION

The Director will send a copy of the determination to all parties. See 452 Code Mass. Regs. § 4.09(3).

e. ATTORNEY'S REQUEST

The employee's attorney should request reinstatement of weekly benefits *in writing* to the Director of OEVR.

f. APPEALS

There is an appeals process that may be pursued from any determination. It is discussed in Section 7 below, at 35.

g. FURTHER DISCUSSION

There is further discussion of 15% reductions below, at 47. See also Flow Chart in Appendix A, Part 3, at 180.

7. APPEALS PROCESS

GENERAL COMMENTS

The Office of Education and Vocational Rehabilitation and G.L. c. 152, §§ 30G, 30H provide two methods of appeal where there is a 15% reduction in benefits for an employee's non-participation. The first is an administrative appeal process (non-litigious) which is different from the claims appeal process (litigious). Both processes give all parties an avenue of appeal.

a. APPEAL UNDER G.L. c. 152, § 30H

The first appeal method under § 30H is handled initially by OEVR where the parties have an opportunity to be heard and to submit relevant information and documents. Section 30H appeals from OEVR's decisions are only to the Commissioner, subject to a declaratory judgment or an action in the nature of certiorari in some cases.

In Doyle v. Department of Industrial Accidents, 50 Mass. App. Ct. 42 (2000), the Appeals Court held that because the statute did not develop specific criteria for entitlement to VR and OEVR has considerable discretion to determine whether VR benefits are appropriate, there is no property right to VR and thus, there was no violation of due process by the Department in its procedures. In addition, the court noted there is a right to limited judicial review.[10]

The Doyle court, however, leaves open the question, where benefits have been ordered or accepted and there is a 15% reduction, of whether there is a property based entitlement requiring a hearing and other procedural due process protections. At present, the current practice of conducting hearings as outlined below will continue. The Doyle case is reproduced in this Manual in Part VI (D), at 130.

The present general practice in appeals to the Commissioner is to conduct an informal hearing with testimony and submission of relevant documents, where a 15% reduction is ordered and challenged. The Department is currently considering promulgating regulations in 452 Code Mass. Regs. to codify this practice. A written decision with findings is sent to the parties.

[10] The Doyle court noted that there is a right to a declaratory judgement or certiorari in limited circumstances. Doyle, Infra at 129-135.

b. APPEAL UNDER G.L. c. 152, § 30G

Where a 15% reduction has been instituted, an employee can file a claim in the Division of Dispute Resolution as a second method of appeal, pursuant § 30G. The injured worker must then prove to an administrative judge that no rehabilitation of any kind would benefit him/her. The judge's decision may then be appealed to the reviewing board and from there to the appellate courts.

c. CHOICE OF REMEDIES

Prior practice encouraged the exhaustion of remedies available under G.L. c. 152, § 30H before initiating an action under G.L. c. 152, § 30G. There is, however, nothing in the law which would preclude pursuit of either or both avenues of appeal.

d. RETROACTIVE RESTORATION

The Department practice formerly was to deny any *retroactive restoration of a § 30G, 15% reduction in benefits*. It is clear that G.L. c. 152 neither provides for nor precludes retroactive restoration. There are certain circumstances where it is appropriate to conduct a hearing on the merits with legal counsel and the Director of OEVR present. Following the hearing, a written recommendation will be made to the Commissioner complete with findings of fact and relevant legal authority to satisfy the minimum requirements of due process. See Doyle, supra, par. a, at 35. This procedure takes place infrequently, on a case by case basis. Indeed, in a year and one half, this process has been deemed necessary in only one case. See Appendix C, at 196 for the findings and rulings in this case.

8. TRUST FUNDS

G.L. c. 152, § 30H, § 65(2)
452 CODE MASS. REGS. §§ 4.02, 4.07

GENERAL COMMENTS

There are some active cases that become Trust Fund cases. This occurs where there is an uninsured employer *or* when the insurer refuses to fund VR services either at the DOS eligibility stage, by refusing to assign a VR provider, or at the IWRP stage, where the insurer has in fact assigned a provider but refuses to fund the recommended IWRP. At this stage, if OEVR agrees to fund the VR services, both categories of cases become Trust Fund cases. Under a coordinator, pursuant to § 65 of G.L. c.152, the RRO's responsibility is to process the appropriate encumbrance funding forms to insure that the VR programs are paid. Additionally, the RROs continue to monitor the VR program to assure successful completion.

a. LENGTH OF SERVICES

The length of the IWRP program is not to exceed OEVR time frame guidelines (i.e. 104 calendar weeks maximum post-December 23, 1991 or 52 weeks pre-December 23, 1991). Upon completion of those Trust Fund cases where the insurer has refused to provide VR, the RRO compiles the necessary documentation and provides it to the director of OEVR so that the insurer can be fined for a *minimum of twice the cost of the VR program.* G.L. c. 152, § 30H.[11] The information that the Director receives is sent to the Trust Fund coordinator who pursues collection for a minimum of twice the cost from the insurer. G.L. c. 152, § 30H.

b. UNINSURED EMPLOYERS

When an uninsured employee receives a Determination of Suitability (DOS), the RRO selects a certified provider and refers the case to the Trust Fund Manager. OEVR completes the necessary encumbrance and payment authorization forms for Trust Fund approval. If the employee has not been evaluated for a DOS, the Trust Fund has the ability to request such an evaluation. For purposes of funding VR services, the Trust Fund is treated like any other insurer. G. L. c. 152, § 65. If a DOS is forthcoming, the RRO monitors the VR services in the same manner as under G.L. c.152, §§ 30G, 30H.

[11] The insurer may contest such an assessment to the Division of Dispute Resolution. The employee shall not be a party to such proceedings. G.L. c. 152, § 30H.

c. MODIFICATION TO PRE-REQUISITES FOR TRUST FUND INVOLVEMENT

Prior to assessing the Trust Fund for VR services, where the insurer resisted payment, OEVR previously required that there be a 10% functional impairment and a $400 average weekly wage. There is nothing in the statute or the regulations requiring that threshold. Previous personnel inserted it. The Manuals have deleted that language in conformity with the statute, G.L. c. 152, § 30H; G.L. c. 152 § 65.

d. INSURER REFUSAL TO PAY: PENALTIES

Regional Review Officers are aware that G.L. c. 152, § 30H mandates that if the insurer unreasonably refuses to provide the VR program developed by the office, OEVR *shall* provide it to the employee with Trust Fund money pursuant to G.L. c. 152, § 65(d). If the program is successful, OEVR *shall* assess the insurer *"no less"* than twice the cost incurred by OEVR, which monies shall be paid into the Trust Fund. Id. The Department has approved the enforcement of this section. Assessing more than twice the cost is an option, (i.e. OEVR will recommend any penalty above twice the cost of the program to the Director of Administration, who will forward it to the Trust Fund for collection).[12]

e. PROSTHESIS OR OTHER MECHANICAL APPLIANCES UNDER G.L. c. 152, § 30 (par.4)

In ordering necessary aids, the provisions of § 30 (par.4) apply to Trust Fund cases as well as other cases. See G.L. c. 152, § 30 (par.4) discussion, supra at 22-23. In addition, where an IWRP is in place, if there is an insurer who refuses to pay for necessary aids determined to be required by OEVR under § 30 (par.4), Trust Fund encumbrances may be utilized. G.L. c. 152, § 65. See G.L. c. 152, §§ 30H, 65.

If a G.L. c. 152, § 30 (par. 4) OEVR determination is part of the § 30G or § 30H IWRP, the Trust Fund may be responsible for the costs, because the determination is arguably part of the VR "program" for the employee. See G.L. c. 152, §§ 30H, 30G, 65. The § 30 (par. 4) form is reproduced at 172.

[12] There is further discussion of OEVR's interaction with the Trust Fund below at 22, 26. See also flow chart, at 181.

9. LUMP SUM REQUESTS

G.L. c. 152, § 48
452 CODE MASS. REGS. § 4.10

GENERAL COMMENTS

LUMP SUM AGREEMENTS: INTERACTION WITH OEVR

Any time after being deemed suitable, the employee's vocational rehabilitation remains open and active in the system. The statute maintains that lump sum agreements shall be valid only where the employee has returned to continuous employment for a period of six or more months or completed an approved IWRP. If vocational rehabilitation is active, an employee must receive express written consent from OEVR or an order or decision from an administrative judge or administrative law judge authorizing any lump sum agreement. See G.L. c. 152, § 48 (3).

a. OPEN CASES

When vocational rehabilitation is active, even before an IWRP is in effect, parties should contact the OEVR Director **IN WRITING** two weeks prior to the lump sum conference. 452 Code Mass. Regs. § 4.10. The letter should include the employee's name, address, DIA number, date of lump sum conference (LSC), regional office, and a rationale as to why OEVR consent is being requested. The Director of OEVR determines if a consent is warranted on a case by case basis**. (NOTE: VR status can be confirmed by contacting OEVR Disability Analysts prior to LSC.)**

b. CASES THAT ARE NOT OPEN IN OEVR

These cases do not require a written consent from OEVR as a condition precedent to the validity of the lump sum agreement. These cases must be **CONFIRMED** as having a VR status to be one of the following:

(1) No determination has been made with respect to the employee's suitability for VR pursuant to § 30G;

(2) the employee has been found *not suitable* by OEVR pursuant to § 30G;

(3) the employee has returned to continuous employment for a period of six or more months pursuant to G.L. c. 152, § 48(3);

(4) the employee has completed an approved rehabilitation plan (IWRP).

OEVR only interacts in the lump sum process when an employee deemed suitable has not completed an appropriate VR program pursuant to G.L. c. 152, § 30G. This is procedural in nature and impacts all injury dates, so there are not pre-December 23, 1991 and post- December 23, 1991 criteria, but cases to be lump sum settled with a pre-1986 date of injury have no further rights to VR. OEVR ensures that employees are informed of the revision to the law and VR interaction with the lump sum process. See Appendix A, Part II, at 167-171 (circular letter and lump sum form reproduced).

d. ADDENDUM TO LUMP SUM FORM (Form 116B)

The VR status form must be completed for the Lump Sum papers to be complete. If no determination has been made yet; the employee is found not suitable; the employee has returned to continuous employment for six months; or completed an approved IWRP, consent is not a requirement precedent to the lump sum approval (OEVR confirms the vocational rehabilitation status on all cases). The VR status is confirmed by OEVR and parties can inquire by contacting the OEVR Disability Analyst to verify the status. This procedure is for all injuries except those with dates of injury prior to 1986. Form 116B has been modified and is reproduced in the Manual in Appendix A, at 171.

e. RESPONSIBILITY OF RROs AND/OR DISABILITY ANALYSTS

As requested by the Director or his/her designee, all Regional Review Officers or their Designated Disability Analysts are to complete the Lump Sum consent request form and review the Lump Sum consent form with the Director or his/her designee in order to determine if a lump sum request should be granted on active vocational rehabilitation cases. The Regional Review Officer is responsible for ensuring the information on the consent form is accurate and up to date. See Appendix B, at 185. (RROs and Disability analysts discussed).

f. CONSENT GIVEN OR WITHELD

If consent is given, the lump sum conference event proceeds as scheduled with VR justification. If no consent is given by the Director, then the file goes back into the system to await a merits decision by an administrative judge; or the judge will take the case under advisement until the VR issues are resolved with OEVR, which resolution may include consent with a stipulation to protect the VR benefits of the injured employee.

g. TIME TO REQUEST VR SERVICES AFTER A LUMP SUM

An employee must request VR benefits within two years of perfection of a Lump sum settlement in post-December 23, 1991 cases. G.L. c. 152, § 48(2); St. 1991, c. 398 § 74A. For purposes of G.L. c. 152, § 2A, this section is substantive. St. 1991, § 106. See Jones' Case, 2 Mass. Workers' Comp. Rep. 265 (1988). In pre-December 23, 1991, cases an employee may request VR at any time after a lump sum settlement. See G.L. c. 152, § 48 as amended in St. 1986, c. 662 and St. 1987, c. 691, § 12. In pre-1986 cases, there is no further right to VR where a case has been lump summed.

h. REDEMPTION OF VR BENEFITS

Please note that where liability is established, a lump sum agreement shall not redeem liability for the payment or vocational rehabilitation benefits with respect to such injury. G.L. c. 152, § 48 (2).

i. FLOW CHART

An outline of the procedure to be followed in interaction with OEVR where approval is needed for execution of a lump sum agreement is appended to this document in Appendix C, at 192. See also Flow Chart in Appendix A, Part 3, at 178.

10. CLOSURE PROCEDURES

GENERAL COMMENTS

Determinations of VR case closure depend on where the employee is in the OEVR process. Closure occurs in active cases when the VR process is no longer necessary because rehabilitation has been successful. Successful rehabilitation, as used in 452 Code Mass. Regs. § 4.00, et seq, shall mean 60 days of consecutive employment in a job compatible with the IWRP. See 452 Code Mass. Regs. § 4.02 (definition of "successful rehabilitation").

All requests for closures are filed with OEVR on the DIA Closure Form. This Form is completed and signed by the VR provider and then sent to the appropriate RRO. The VR Provider usually submits a closure report along with the Closure Form. RROs should review the Closure Form for completeness to include DOT codes (when there has been a successful RTW) and the rehabilitation provider costs. The VR provider must also notify the client that the case is being closed. After reviewing and signing the Closure Form, the RRO sends the Closure Form to the data entry clerk for entry into the DIA computer system. A copy is also sent to the VR provider for his/her records. The provider must call the RRO for approval before they close a case. The Case Closure form is reproduced below, at 164.

III. OEVR INTERACTION WITH DISPUTE RESOLUTION

GENERAL COMMENTS

While OEVR, and not an administrative judge or the reviewing board, has the authority to determine whether vocational rehabilitation is necessary and feasible to return an employee to suitable employment at an appropriate average weekly wage, there are several areas where the OEVR process interacts with the Department of Dispute Resolution. See G.L. c. 152, § 30H; 452 Code Mass Regs. § 4.09(1). In such cases, a claim may be filed with the Division of Dispute Resolution over a disputed issue and there are appellate rights to the reviewing board and the courts. These instances of interaction are outlined below with appropriate citations.

A. DISCONTINUANCE OF WEEKLY BENEFITS

An insurer may lawfully discontinue weekly compensation benefits where the insurer has received communication from OEVR authorizing suspension or reduction of payments under § 30G. G.L. c. 152, § 8(f). This could result in an appeal under § 30G with Dispute Resolution to prove that no VR of any kind would be appropriate. See Flow Charts, at 178,179,180, see also, supra, at 33-34

B. LIABILITY ESTABLISHED BY DISPUTE RESOLUTION

Where liability has been established in a proceeding before the Department of Dispute Resolution, the employee may be eligible for OEVR services after a Determination of Suitability (DOS) has been rendered by OEVR. See supra at 10-15 (discussing eligibility). This is includes a conference order or hearing decision, See supra, at 12(2) and cites supra at 27, infra at 161 (modified DOS form).

C. PROSTHESIS OR MECHANICAL APPLIANCE

OEVR has concurrent jurisdiction with the Division of Dispute Resolution and the Health Care Services Board (HCSB) under paragraph 4 of G.L. c. 152, § 30 to determine that a prosthesis or other mechanical appliance would promote [the employee's] restoration to or continuation in industry.

The Director of OEVR has developed a DETERMINATION FORM to be utilized in such a situation. If the determination is resisted by the insurer, it may become the basis of a § 30 (par. 4) claim filed with the Division of Dispute Resolution. It would then be routed through standard Dispute Resolution channels to an administrative judge. If the content of the DETERMINATION is ordered by a judge at conference, then, immediate enforcement is available in the Superior Court under G.L. c. 152, § 12. It is to be noted that an expedited conference for hardship is available. See supra at 22-23 (discussing the same); see Appendix A, at 172. (DETERMINATION FORM reproduced); see also Forms 131, 132. (see Appendix A, at 172-174). See also par. e., at 38 (discussing Trust Fund involvement where a § 30 (par. 4) Determination is part of an IWRP.

D. TRUST FUND

If an insurer refuses to fund VR services under OEVR, or where there is an uninsured employer, the Office shall provide it with Trust Fund money pursuant to § 65. Upon successful completion of the program; OEVR shall assess the insurer *no less than twice the cost* incurred by the Trust Fund. The insurer may contest any aspect of the assessment by filing a complaint with the Division of Dispute Resolution. The employee shall not be a party to the proceeding. G.L. c. 152, §§ 30H; 65(2); 452 Code Mass. Regs. §§ 4.02, 4.07. See supra at 37, 46(discussing Trust Fund).

E. APPEALS

There are two methods of appeal from OEVR determinations reducing benefits. One is initially to OEVR and then to THE COMMISSIONER under G.L. c. 152, § 30H. See supra at 35 (discussing appeals to the Commissioner). The other method is to file a claim with the Department of Dispute Resolution pursuant to § 30G. Under § 30G the injured worker must prove to an administrative judge that *no vocational rehabilitation of any kind* would be of benefit. The judge's decision can then be appealed to the reviewing board and the appellate courts. See supra at 35(discussing appeals). See Flow Charts, at 178, 179, 180.

F. EARNING CAPACITY

General Laws c. 152, § 35D(5) provides that the fact an employee has "enrolled" or is "participating" in a VR "program" paid for by the Trust Fund or the insurer shall not be used to decrease compensation by the assignment of an earning capacity in the Division of Dispute Resolution. The terms "enrolled" or "participating"and "vocational rehabilitation program" have not yet been defined in the case law. *Arguably*, an employee is protected as "enrolled" or "participating" in an insurer paid VR "program" from the time of the Determination of Suitability (DOS) or perhaps even at the first Mandatory Meeting. Most certainly, an employee is protected during the execution of an IWRP. See supra at 30-32 (discussing use of damaging Hypothetical Labor Market Surveys).

G. LUMP SUM REQUESTS

Where an employee has been found suitable for VR services pursuant to § 30G, lump sum requests shall be valid only where the employee has returned to continuous employment for six or more months, completed an approved rehabilitation plan, *received written consent* from *OEVR,* or by an order or decision from an administrative judge or administrative law judge authorizing such agreement. G.L. c. 152, § 48(3). Consent by OEVR is required in VR open cases. G.L. c. 152, § 30G; 452 Code Mass. Regs. § 4.11. Consent to Lump Sum requests for VR open cases is procedural and applies to all post 1986 cases regardless of the injury date.

In post-December 23, 1991 cases, an employee must request VR services within two years of the perfection of the settlement. G.L. c. 152, § 48, as amended by St. 1991, § 74A. For purposes of G.L. c. 152, § 2A, this section is substantive. St. 1991, § 106. See Jones' Case, 2 Mass. Workers' Comp. Rep. 265 (1988). In pre-December 23, 1991 cases, there is no limitation on the time when an

employee can request the services of OEVR. See G.L. c. 152, § 48, as amended in St. 1986, c. 662 and St. 1987, c. 691, § 12. See supra at 39 (discussing Lump Sums). In pre-1986 cases that are lump summed, there is no further right to claim VR.

> For post 1986 injury date cases a lump sum agreement shall "not redeem liability for the payment of [ ]vocational rehabilitation benefits with respect to such injury." G.L. c. 152, § 48(2).

H. LEGAL AUTHORITY

For further information and relevant legal authority, please see Part VI of this Manual which includes Key Provisions relating to OEVR; a Memorandum on Provisions and Revisions to G.L. c. 152 relevant to OEVR; as well as 452 Code Mass. Regs. and related reviewing board and court cases. Appended hereto, at 49-129.

I. FLOW CHART

A Flow Chart of OEVR interaction with Dispute Resolution is in Appendix A, Part 3, at 177. A Flow Chart of OEVR interaction with Dispute Resolution in Lump Sum Conference is at, 178. See also Appendix A, Part 3, at 183 (Disability Analyst Flow Chart on OEVR Interaction with Dispute).

IV. OEVR INTERACTION WITH THE TRUST FUND AND BUDGET

A. REFUSAL TO FUND

Under G.L. c. 152, § 30H, if the insurer refuses to fund VR services, OEVR utilizes Trust Fund encumbrances to pay. In addition, if the insurer and employee fail to agree upon a plan, the employee may apply to OEVR for the services and if there is a favorable DOS, OEVR will select a certified provider to develop an IWRP and administer the VR services. OEVR informs the insurer and employee of its determinations and the program is developed. The insurer has ten days to review the program and if it still refuses to provide the VR, OEVR funds the plan with Trust Fund money under G.L. c. 152, § 65. If the program is successful and the employee returns to suitable employment, the DIA Budget department will be notified by the Director and it will bill the insurer a *minimum of twice the cost* of the VR services. The insurer may contest the finding by filing a claim with the Division of Dispute Resolution within ten (10) days of the billing. G.L. c. 152, §§ 30H; 65(2)(d). If there is no successful return to work, the insurer does not have to pay the bill. Where there is refusal to fund an IWRP that includes a necessary prostheses or mechanical appliances Determination under G.L. c. 152, § 30 (par.4), Trust Fund monies may also be used if the § 30 (par.4) Determination is part of an IWRP.

B. UNINSURED EMPLOYER

Where an uninsured employee receives a DOS, the RRO informs the Trust Fund Manager who selects a certified provider to deliver the VR services. OEVR completes the necessary encumbrance and payment authorization forms for Trust Fund approval. The RRO monitors VR in the same manner as other cases under §§ 30G, 30H. See Flow Charts, at 181.

C. FURTHER DISCUSSION

See supra, at 37 (further discussion of Trust Fund).

D. FLOW CHART

A flow chart of OEVR's interaction with the Trust Fund and Budget is in Appendix A, Part 3, at 181.

V. SUSPENSIONS AND/OR 15% REDUCTION OF WEEKLY BENEFITS

A. DISCONTINUANCE

If an employee refuses to attend a Mandatory Meeting after a second notice, the insurer may be notified by OEVR authorizing suspension or reduction of weekly benefits by OEVR. See G.L. c. 152, §§ 30G, 8 (2) (f); 452 Code Mass. Regs. § 4.09(1).

B. 15% REDUCTION

OEVR can also authorize a 15% reduction in benefits at any time during the VR process where an employee has received a DOS and is non-participatory. The insurer must request the reduction. The Director then reviews the request with the RRO and the Certified Provider for assessment. If the Director finds the 15% reduction appropriate, s/he will write a letter to the insurer authorizing the 15% reduction.

C. RECISSION OF REDUCTION

If the employee actively resumes services or justifies, to the satisfaction of OEVR, the appropriateness of the refusal, OEVR will notify the insurer to reinstate the weekly indemnity benefits.

D. APPEALS AND RETROACTIVE OF BENEFITS

The appeal process from suspension or reduction of benefits is discussed above at 35. Retroactive restoration of benefits is discussed above at 36.

E. FLOW CHART

A. Flow Chart of suspensions and 15% reductions of “weekly benefits” is in Appendix A, Part 3, at 180.

VI. CONTROLLING LEGAL AUTHORITY

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A. KEY PROVISIONS OF LAW RE: VOCATIONAL REHABILITATION

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Regulations: 452 Code Mass. Regs. §§ 4.03, 4.04

2. Encouragement of Voluntary Agreements for VR Services

Statute: G.L. c. 152, § 30E

3. Identification of Injured Employees in Need of VR Services

Statute: G.L. c. 152, § 30F

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4. Conducting Mandatory Meetings

Statute: G.L. c. 152, § 30G (1st par.)

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Statute: G.L. c. 152, § 30G (1st par.)

Regulation: 452 Code Mass. Regs. §§ 4.05(2), 4.06

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Statute: G.L. c. 152, § 30H

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7. Access to Jobs and Job Training Programs for Injured Employees

Statute: G.L. c. 152, § 30I

8. Authorization of the Following Actions:

(a) Consent for Lump Sum Settlements

Statute: G.L. c. 152, § 30G (1st par. as added by St. 1991, c. 398, § 54)

Regulation: 452 Code Mass. Regs. § 4.10

(b) 15% Reduction in Weekly Benefits for Refusal of Services

Statute: G.L. c. 152, § 30G (as added by St. 1991, c. 398, § 54)

Regulation: 452 Code Mass. Regs. §§ 4.09(2), (3)

(c) Forfeiture of Benefits for Refusal to meet with OEVR

Statute: G.L. c. 152, § 30G (1st par.)

Regulation: 452 Code Mass. Regs. §§ 4.09(1)-(3)

(d) Suspension of Benefits for Refusal of Insurer's Written Request to Meet with OEVR Specialist

Statute: G.L. c. 152, § 45 (1st par. as amended by St. 1991, c. 398, § 72)

Regulation: 452 Code Mass. Regs. §§ 4.09(1), (3)

9. Eligibility Criteria

The Department has reviewed eligibility criteria in instances where weekly benefits are terminated or suspended for various statutory reasons. What is clear, is that termination or suspension of weekly benefits does not in itself make an employee ineligible for VR benefits. See Part II, Section B, at 10-15(discussing eligibility and some situations where there may be eligibility for VR services depending on a particularized determination in a case).

10. Appeals from Termination, Suspension, or Reductions in Benefits

Statute: G.L. c. 152, §§ 30G, 30H. See supra, at 35 (discussing Appeals).

B. MEMORANDUM ON PROVISIONS AND REVISIONS IN THE DECEMBER 23, 1991 REFORM ACT INVOLVING VR

Many of the December 23, 1991 new law revisions impacted and expanded the role of the Office of Education and Vocational Rehabilitation. Most of the mandates are procedural, effecting injuries back to November 1, 1986 when the previous reform was enacted. The following outlines all OEVR sections of the new statute with the underlined and bold sections indicating amendments to Chapter 152:

Section 30: *Medical and hospital services*
In any case where an AJ/ALJ, OEVR or Health Care Services Board (HCSB) is of the opinion that the fitting of an employee eligible for compensation with an artificial eye, limb, or other mechanical appliance, will promote restoration to or continuation in industry, it may be ordered that such employee be provided with such item, at the expense of the insurer. These provisions are applicable, notwithstanding the fact that maximum compensation under other sections of the chapter may have been received by the employee. This is procedural and applies to all dates of injury. St. 1991, c. 398, § 53. See Stevens v. Northeastern Univ., 11 Mass. Workers Comp. Rep. 167 (1997) (discussing breadth of appliances which may be ordered to return an employee to gainful employment). This case is reproduced here in Section VI (D), at 116.

Section. 30E: *Development of voluntary agreements*
It shall be policy of the department to encourage and assist in development of voluntary agreements between injured employees and insurers to provide and utilize vocational rehabilitation services when necessary to return such employees to suitable gainful employment. The department shall promulgate rules and regulations to implement such policy. (no change).

Section 30F: *Identification of cases in which vocational rehabilitation services may be required*
The Commissioner shall promulgate rules and regulations for the identification and reporting to the office of education and vocational rehabilitation of cases in which vocational rehabilitation services may be required. The purpose of said rules and regulations shall be to facilitate the earliest possible identification of such cases. (no change).

Section 30G: *Meetings with injured employees requiring vocational rehabilitation services*
OEVR shall contact and meet with each injured employee who it believes may require vocational rehabilitation services in order to return to suitable employment. Any such employee who refuses to meet with OEVR shall not be entitled to weekly compensation benefits during period of such refusal. (no change).

Section 30G (cont): An insurer may reduce weekly benefits by 15% to any employee deemed suitable for vocational rehabilitation services by OEVR when such employee refuses such services during the period of refusal. No lump sum settlement shall be reached when deemed suitable by OEVR (Note: this does not mean a certified provider) who has not completed an appropriate vocational rehabilitation program, pursuant to § 30, without the express written consent of said office. Any employee aggrieved by a 15% reduction or prohibition of a lump sum settlement under this section (i.e. § 30G) may file a claim for reinstatement of benefits or removal of such prohibition; provided that compensation shall not be reinstated nor the settlement allowed unless the claimant demonstrates that no vocational rehabilitation program of any kind would be appropriate for such claimant. This new section is procedural and applies to all dates of injury. St. 1991, c. 398, § 54.

Section 30H: *Applications for vocational rehabilitation services*
If the insurer and employee fail to agree to a vocational rehabilitation program, the employee may apply to OEVR for services. If the Office determines vocational rehabilitation is necessary and feasible, it shall promptly develop, after such consultation, as it judges reasonable with the employee and insurer, an appropriate program of no greater than **one hundred and four weeks for the employee** (consecutive calendar weeks). Previously, this section provided 52 weeks of VR for pre-December 23, 1991 cases. This new provision for 104 weeks is substantive and applies to post-December 23, 1991 cases only. St. 1991, c. 398, § 55, in the fourth sentence substituted "one hundred and four" for "fifty two."

The commissioner shall provide by rule for efficient procedures and quality controls in the office's management of such programs, which may be carried out under contract by private rehabilitation services providers. If, upon completion of the program, the office determines that the program was successful and returned the employee to suitable employment, it shall assess the insurer no less than twice the cost incurred by the office and such assessment shall be paid into said trust fund. The insurer may contest any aspect of the assessment by filing a complaint with the division of dispute resolution. The injured employee shall not be a party to such proceedings. (no change).

A public employer or public employer self-insurance group which has filed notice of non-participation under § 65, and which has appealed the determination of OEVR to the Commissioner shall be bound by the decision of the Commissioner and, if required by such decision, shall provide the vocational rehabilitation program developed by the Office. Such decision shall be enforceable in the same manner as an order pursuant to § 12. This is a new paragraph and is procedural applying to all cases regardless of the date of injury. St. 1991, c. 398, § 56.

Section 30 I: Availability of new jobs and job training programs (no charge).

Section 35D(5): *Computation of weekly wage*

The fact that an employee has enrolled or is participating in a vocational rehabilitation program paid for by the insurer or the department shall not be used to support the contention that the employee's compensation rate should be decreased in any proceeding under this chapter. St. 1991, c. 398, § 65, in subsection (5) added this provision. This is procedural.

Section 45: *Examination by physician; filing copy of report; refusing or obstructing examination; reimbursement of travel expenses and wages*
The employee's right to compensation shall also be suspended during a period when the employee refuses an insurer's written request that the employee be evaluated by a vocational rehabilitation specialist within the department. This request may occur only once every six months. This is a new section and applies to all cases (procedural). St. 1991, c. 398, § 72.

Section 48(2): *Lump sum agreements (subsection (2), in the second paragraph, in the fourth sentence added the following provision)*
[No] employee shall be entitled to vocational rehabilitation benefits for any injury unless such employee shall have requested such benefits within two years of perfection of any settlement under this section of benefits due for said injury. This is a new section and is substantive, applying only to post – December 23, 1991 cases. St. 1991, 398, § 74A.

Section 48(3): **Where an employee has been found suitable for vocational rehabilitation services pursuant to § 30G, lump sum agreements shall be valid only where the employee returned to continuous employment for a period of six months or more; or completed an approved rehabilitation plan; received express written consent from OEVR; or an order or decision from an administrative judge or administrative law judge authorizing such agreement**. This is a new section and is procedural, applying to all cases. St. 1991, c. 398 § 75.

Section 65 (2)(d): *Special Fund; trust fund*
Payment of vocational rehabilitation benefits pursuant to § 30H by the Trust Fund. This is a new section and applies to all cases (procedural). St. 1991, c. 398, § 85. G.L. c. 152, § 30H provides: If the insurer refuses to provide the vocational rehabilitation program developed by the office, the office shall provide it to the employee with trust fund money pursuant to § 65. The Commissioner shall provide by rule for efficient procedures and quality controls in the office's management of such programs, which may be carried out under contract by private rehabilitation service providers. If upon completion of the program, the office determines that the program was successful and returned the employee to suitable employment, it shall assess the insurer no less than twice the cost incurred by the office and such assessment shall be paid into said trust fund. St. 1985, c. 572, § 40, made effective November 1, 1986. (no change).

C. 452 CODE MASS. REGS. §§ 4.00 – 4.11

452 CMR 4.00: VOCATIONAL REHABILITATION

Section

4.01: Scope and Authority

452 CMR 4.00 is promulgated pursuant to M.G.L. c.152, §1(12), as amended by St. 1991, c.398, §15 and §30F, as amended by St. 1986, c.662, §29, for the purpose of carrying out the requirements of M.G.L. c.152 relative to the provision of appropriate vocational rehabilitation services as overseen by the Office of Education and Vocational Rehabilitation (OEVR).

4.02: Definitions

(1) Amendment to the Individual Written Rehabilitation Program as used in 452 CMR § 4.00, shall mean any addition, deletion, or substitution in the employment goal, scope of services, responsibilities, or costs of the individual written vocational rehabilitation plan.

(2) Catastrophic Injury as used in 452 CMR § 4.00, shall be one in which an individual has sustained loss of function involving, but not limited to, any of the following conditions:

(a) mangling, crushing or amputation of a major portion of an extremity,
(b) traumatic injury to the spinal cord that has caused or may cause paralysis,
(c) severe burns that require burn center care, or
(d) serious head injury, loss of vision in both eyes, or loss of hearing in both ears.

(3) Determination of Suitability, as used in 452 CMR §4.00, shall mean an evaluation of an injured employee as to appropriateness for vocational rehabilitation services by a vocational rehabilitation review officer employed by OEVR, referred to in M.G.L. c. 152, §30G.

(4) Feasibility of Vocational Rehabilitation, as used in M.G.L. c. 152, §30H, and 452 CMR § 4.00, shall mean the practicality of recommending vocational rehabilitation services with respect to the cost-benefit ratio of such services, predictable return to function and duration of future employment, and the injured employee's pre-injury wage.

(5) Functional Limitation, as used in 452 CMR §4.00, shall mean the residual effect of physical or psychiatric injury or occupational disease as related to capacity to work.

(6) Individual Written Rehabilitation Program (IWRP), as used in 452 CMR §4.00, shall mean the source document for the injured employee's individual rehabilitation program, referred to in M.G.L. c. 152, §30G, which lists the services, costs, and responsibilities of all participants and which is developed by an OEVR certified rehabilitation provider but approved by the office of education and vocational rehabilitation.

(7) Mandatory Meeting, as used in M.G.L. c.152, § 30G and 452 CMR §4.00 shall mean the initial interview between a workers' compensation recipient and a vocational rehabilitation review officer employed by OEVR. [referred to in M.G. L. c. 152, § 30G].

(8) Necessity of Rehabilitation, as used in M.G.L. c. 152, §30H, and 452 CMR §4.00, shall mean circumstances in which an injured employee can not return to his or her former job with his or her former employer without job modification or job redesign, or placement in another job with or without retraining because of the functional limitation resulting from his or her injury.

(9) Qualified Rehabilitation Counselor, as used in 452 CMR §4.00, shall mean any person who is approved to serve workers' compensation recipients pursuant to 452 CMR §4.03 (2).

(10) Reasonable Incidental Costs, as used in 452 CMR §4.00, shall mean the cost of travel to a rehabilitation program site, as well as other expenses directly related to the rehabilitation program without which the injured employee would be unable to participate.

(11) Successful Rehabilitation, as used in 452 CMR §4.00, shall mean sixty (60) days of consecutive employment in a job compatible with the IWRP.

(12) Systemic Injury, as used in 452 CMR §4.00, shall mean an injury which affects an entire body system, such as the respiratory or neurologic system, as opposed to an injury which limits function in one area, such as a muscle sprain or strain.

(13) Team Meeting, as used in 452 CMR §4.00, shall mean a special meeting with OEVR inclusive of all parties involved in the vocational services being administered to an injury employee.

(14) Transferable Skills, as used in 452 CMR §4.00, shall mean any combination of learned behavior, natural talents, and work-related skills which can be adapted from one work setting to another.

4.03: Qualifications and Standards of Providers

(1) Vocational rehabilitation services may be provided to injured employees only by organizations approved by OEVR as qualified providers. Requests for such approval may be submitted to OEVR by:

(a) any state vocational rehabilitation agency or employment and training agency which delivers vocational rehabilitation services or placement services to handicapped persons, or

(b) any insurer, self-insurer, or private vocational rehabilitation organization, including corporations, partnerships, and sole proprietorships engaged in the provision of vocational rehabilitation services or placement of handicapped persons in employment.

(2) Any such vocational rehabilitation provider shall furnish to the office of education and vocational rehabilitation certification that each rehabilitation counselor who serves workers' compensation recipients has attained any or all of the following credentials:

(a) the certified rehabilitation counselor designation or the certified insurance rehabilitation specialist designation;

(b) a master's degree in vocational rehabilitation or an allied social science, such as physical therapy, occupational therapy, psychology, social work, nursing, or guidance and counseling, and a minimum of one years work experience in vocational rehabilitation;

(c) a bachelor's degree and a minimum of five years work experience in vocational rehabilitation, unless the bachelor's degree is in vocational rehabilitation, nursing, or an allied social science, in which case the counselor shall have attained at least two years work experience in vocational rehabilitation;

(d) a minimum of ten years work experience in vocational rehabilitation;

(e) registered nurses with three years experience in vocational rehabilitation; or

(f) licensure as a rehabilitation counselor from the board of allied mental health and human services professions.

(3) No employee of a vocational rehabilitation provider shall have primary responsibility for a workers' compensation rehabilitation case unless he or she has been approved as a qualified rehabilitation counselor pursuant to 452 CMR § 4.03 (2). Persons who have not been so approved may serve injured employees provided that they do so under the supervision of an approved rehabilitation counselor. Such supervision shall include co-signing of any report or plan required by OEVR. No supervised employee shall share supervision with more than three other such employees.

(4) Approval of a vocational rehabilitation provider shall be effective for up to one year from the date of approval. Any provider which has secured such approval may request that OEVR renew such approval. Any such renewal shall be effective for up to one year from the date of renewal. In considering whether approval or renewal is appropriate, OEVR shall determine whether the provider has:

(a) observed all applicable federal, state, and local laws, regulations, and ordinances;

(b) accurately represented its services and credentials in reports or certifications required by OEVR, and in any advertisements;

(c) avoided conflicts of interest in the provision of vocational rehabilitation services; and

(d) honored injured employees' rights to privacy.

4.04: Evaluation, Suspension and Removal of Providers

(1) Pursuant to M.G.L. c. 152, §30H, each rehabilitation provider which offers services to workers' compensation recipients shall be evaluated periodically by OEVR. The evaluation shall focus on the quality of services provided, the costs of such services, and the results achieved by such services including the providers record relative to the avoidance of conflicts of interest in the provision of vocational rehabilitation services. In conducting such an evaluation, OEVR shall monitor and evaluate each individual written rehabilitation program implemented by the provider, documenting the injured employee's utilization of services and achievement of program goals.

(2) OEVR shall notify in writing any rehabilitation provider who, according to the annual evaluation, fails to meet service or cost effectiveness standards. Such notice shall state specifically the reasons for OEVR's finding of sub-standard performance. In order to satisfy OEVR, that a performance deficiency has been corrected, each such provider shall submit any documentation required by OEVR to monitor and evaluate corrective actions taken by the provider. Unless the provider corrects each stated performance deficiency within 30 calendar days from the receipt of such notice, said provider may be suspended or removed by the commissioner from the OEVR's list of approved providers. In the event that the provider is removed from the approved list of providers, an appeal may be submitted in writing to the commissioner within 14 days of such providers receipt of notice of removal or suspension.

(3) Certified providers performing any type of claims functions apart from vocational rehabilitation services, including hypothetical labor market surveys and earning capacity evaluations, shall be prohibited from providing vocational services to the same injured employee.

4.05: Mandatory Meeting

(1) Whenever an insurer makes payments pursuant to a memorandum submitted to the department pursuant to 452 CMR §1.05(2), or pursuant to an order or decision of an administrative judge, OEVR may contact the injured employee, to determine whether an initial interview is appropriate, according to the following schedule:

(a) any such injured employee who has sustained a catastrophic injury shall be contacted within 14 calendar days of the receipt of such memorandum or issuance of such order or decision;

(b) any such injured employee who has sustained loss of function due to back injury, cardiac condition, cancer, or other systemic injury would require that the individual receive vocational rehabilitation services before returning to work shall be contacted within 49 calendar days of the receipt of such memorandum or issuance of such order or decision;

(c) any other such injured employee shall be contacted within 84 calendar days of the receipt of such memorandum or issuance of such an order or decision, provided that the department has not received a notice of suspension or discontinuance of compensation pursuant to 452 CMR §1.06.

(2) Information gathered by OEVR at the initial interview shall be used to determine whether rehabilitation services are necessary and feasible. Such information shall include, but need not be limited to , the injured employee's:

(a) functional limitations;

(b) employment history;

(c) transferable skills;

(d) work habits;

(e) vocational interests;

(f) pre-injury earnings;

(g) financial needs; or

(h) medical information.

4.06: Notice to Insurer of Suitability

OEVR shall notify the insurer in writing of its determination of suitability and whether vocational rehabilitation has been found to be necessary and feasible for an injured employee. Within (10) working days of receipt of such notification, the insurer shall provide to OEVR all pertinent medical records on the injured employee if not previously submitted. If the insurer fails to produce the requested medical information and the treating physician is unable to provide a current medical report, OEVR shall order an impartial medical examination, the reasonable cost of which shall be reimbursed by the insurer. Otherwise, OEVR will determine suitability based on the information submitted.

4.07: Design of Individual Written Rehabilitation Program

(1) In the event that OEVR determines that vocational rehabilitation services are necessary and feasible for an injured employee, OEVR shall proceed as follows:

(a) When the injured employee, on the date of such determination, is participating in a vocational rehabilitation program initiated by the insurer, OEVR shall require that the individual written rehabilitation program be sent to OEVR and to any person participating in the implementation of the program. OEVR shall either approve or disapprove the program within ten (10) calendar days from the date of receipt of the program. Any comments on the program shall be submitted by participants to OEVR within seven calendar days of date of the office's receipt of the program.

(b) When the injured employee, on the date of such determination, is not participating in a vocational rehabilitation program initiated by the insurer, OEVR will contact the insurer and request that the insurer provide rehabilitation services to the injured employee through an approved provider as outlined in 452 CMR § 4.03. In selecting a provider, OEVR shall consider such matters as: the home address of the injured employee, the business address of the provider, the service specialties, if any, of the provider, the experience of the provider, and the current caseload of the provider. In the event that the injured employee disapproves of the rehabilitation services planned for him or her by the insurer, no such IWRP shall be approved by OEVR until a representative of the insurer authorized to approve expenditures for rehabilitation, the rehabilitation provider, and the injured employee have met with OEVR and agreed on the employment goal, the scope of services, and the cost of the program.

(c) When the insurer, rehabilitation provider, and injured employee fail to agree on the implementation of a program pursuant to 452 CMR § 1.06(1)(b), an individual written rehabilitation program shall be designed by a selected rehabilitation provider in accordance with OEVR specifications. The cost of such a program shall be assumed by the Workers' Compensation Trust Fund under M.G.L. c. 152, § 65 (2) (d) and the insurance company will be assessed pursuant to M.G.L. c. 152, § 30H upon the attainment of a successful rehabilitation as defined in 452 CMR §4.02.

(2) Vocational rehabilitation services set out in an individual written rehabilitation program may include, but not need to be limited to:

(a) vocational assessment;

(b) work evaluation;

(c) job analysis;

(d) job modification;

(e) vocational counseling;

(f) job placement and follow-up;

(g) on the job training; or

(h) retraining.

(3) In establishing the employment goal of the individual written rehabilitation program, the participants shall give priority to returning the injured employee to employment with the pre-injury employer in the pre-injury job, or in said job modified to accommodate the injured employee's residual impairments. In the event that the injured employee's functional limitations or constraints of the local labor market preclude return to the pre-injury job, then the participants shall establish an employment goal appropriate to such injured employee's pre-injury wage, transferable skills, and employment history.

4.08: Amendment, Suspension or Termination of the Rehabilitation Program

(1) Whenever significant change in the life circumstances of the injured employee such as a medical reversal occurs, the IWRP shall be amended, suspended or terminated. Any amendment shall document the changed life situation and reflect appropriate medical, vocational or environmental intervention of the injured employee. Although an amendment may be substantive, such as a change in the employment goal or scope of service, the insurer shall not be liable for the cost of multiple or successive rehabilitation programs as defined by OEVR.

(2) In any circumstance in which the office determines that the health or well-being of the injured employee is jeopardized, OEVR may order that services be terminated immediately.

4.09: Notification and Authorization to Insurers Relative to Refusal of Vocational Services

(1) If it is determined by OEVR that an initial interview is appropriate, said office shall schedule the mandatory meeting of said injured employee at a mutually convenient time as soon as practicable. If the injured employee fails to appear at the scheduled interview, OEVR shall reschedule by certified letter, however, if the injured employee fails to appear again, OEVR shall notify the insurer in writing, pursuant to M.G.L. c. 152, § 30G, that the injured employee is not entitled to weekly compensation during the period of such refusal to attend the mandatory meeting.

(2) When an injured employee is determined suitable for vocational rehabilitation services by OEVR and refuses such services, the insurer may request written authorization from OEVR for a 15% reduction in weekly benefits for the time such injured employee refuses vocational services. In accordance with M.G.L. c. 152
§ 8 (2)(f), OEVR will confirm authorization for reduction for refusal of such services in writing after the following:

(a) where OEVR holds a team meeting of all parties to resolve vocational issues and obstacles in the process; and/or

(b) where a certified letter is sent to the injured employee instructing s/he to contact OEVR within five (5) working days;

Reinstatement will be authorized by OEVR when an injured employee actively resumes services or otherwise justifies to the satisfaction of OEVR the appropriateness of the refusal.

(3) Whenever an injured employee attends a mandatory meeting, actively resumes services, or otherwise justifies to the satisfaction of OEVR the appropriateness of his or her refusal of services, OEVR will confirm in writing to the insurer that no authorization for suspension or reduction of benefits remains in effect.

4.10: OEVR Consent to Lump Sum Settlements

Where an injured employee who has been deemed suitable for vocational rehabilitation services by OEVR but has not completed an appropriate rehabilitation program requests the consent of OEVR to a proposed lump sum settlement, a letter must be submitted to the Director of OEVR at least two weeks prior to the lump sum conference. The letter must include the following information:

(a) employee name;

(b) DIA board number;

(c) date and region of lump sum conference; and

(d) reason why a review for consent is being requested.

4.11: OEVR Director and Rehabilitation Review Officers

No Vocational Rehabilitation Review Officer or OEVR Director shall be called to testify at any proceeding within the Division of Dispute Resolution regarding any vocational issue which has come before him as the Director or as the Vocational Review Officer.

REGULATORY AUTHORITY

452 CMR § 4.00: M.G.L. c. 152, § 5.

D. REVIEWING BOARD CASES

OPENING STATEMENT

Decisions by the Department of Industrial Accidents reviewing board are meant to resolve and clarify areas of G.L. c. 152 with regards to the Office of Education and Vocational Rehabilitation (OEVR).

There are six areas addressed in this section for you to review.

1. OEVR, not the administrative judge or reviewing board has the authority to determine whether vocational rehabilitation is necessary and feasible to return an employee to suitable employment. See G.L. c. 152, § 30H; 452 Code Mass. Regs. § 4.09 (1).

2. These cases elucidate the language in § 35D(5), which states that "the fact than an employee is enrolled or is participating in a vocational rehabilitation program paid for by the insurer or the department shall not be used to support the contention that the employee's compensation rate should be decreased in any proceeding under c. 152." Participation in vocational services through OEVR, cannot be used as the basis of assigning an earning capacity. A judge may not speculate on possible future changes based on retraining that has not occurred. See G.L. c. 152 § 35D(5).

3. Upon completion of training, actual wages derived therefrom are a proper basis for an earning capacity determination.

4. An administrative judge may rely on a vocational expert's opinion to supplement the § 11A physician's opinion on functional limitations, as long as the vocational expert's opinion is based on interviews with the employee, the expert's personal observations, and his analysis of the employee's performance on certified vocational tests.

5. The administrative judge's authority to reinstate benefits once they have been reduced by 15% for non-compliance with a vocational program is limited under § 30G to situations where "no vocational rehabilitation of any kind would be appropriate." The administrative judge has no authority to address the issue of general compliance with the I.W.R.P. That authority lies solely with the Office of Education and Vocational Rehabilitation. See G.L. c. 152, § 30G; 452 Code Mass. Regs. § 4.09(2).

6. Under § 30, an administrative judge must analyze whether a mechanical appliance will promote the employee's restoration to or continue him in industry, and, if so, he must order the insurer to provide it, as long as it is made necessary by the continuing effects of the industrial injury. See G.L. c. 152, § 30.

The following reviewing board decisions relate to and establish the six propositions stated above. None of the cases attached are under appeal.

D. REVIEWING BOARD CASES REPRODUCED

E. APPELLATE COURT CASES REPRODUCED

CASE #1 Proposition #1

Perry v. Cape Cod Hosp., 9 Mass. Workers' Comp. Rep. 43 (1995).

OEVR, not an administrative judge or the reviewing board, determines whether vocational rehabilitation is necessary and feasible to return the employee to suitable employment. However, an administrative judge may refer an employee to OEVR for such a determination. See § 30H.

Board Number: 11965-90 February 13, 1995

SANDRA PERRY TURO vs. CAPE COD HOSP.
EMPLOYEE EMPLOYER
SELF-INSURER

REVIEWING BOARD: Judges Fischel, McCarthy. and Wilson.

APPEARANCES: John Dow, Esq., for the employee.

Linda Scarano. Esq.. for the self-insurer.

Self-insurer appealed; decision affirmed. as amended with regard to vocational rehabilitation.

1. **VOCATIONAL REHABILITION**-Determination
Any entitlement of an employee to vocational rehabilitation will be resolved through the Office of Education and Vocational Rehabilitation. It was not improper for an administrative judge to *refer* an employee to vocational rehabilitation.

2. **VOCATIONAL REHABILITATION**-Sanctions
Where there was no evidence that the self-insurer declined to provide rehabilitative services to the employee, it was improper for the administrative judge to order the self-insurer to pay a minimum of twice the costs of the rehabilitation program once the employee had successfully completed it.

OPINION

FISCHEL, J.

The self-insurer appeals from the decision of the administrative judge on the sole ground that the judge's findings regarding vocational rehabilitation were beyond his authority and contrary to the law set out in § 30H.

After the employee, a registered nurse, injured her neck in October 1989, forcing her to leave work on March 1, 1990 because of pain, the self-insurer commenced payment of §34 benefits. After denial of the self-insurer's request for discontinuance or modification at conference, the self-insurer timely appealed and a hearing was held. The judge found the employee's neck injury causally related to the October 1989 incident which aggravated an October 1988 neck injury sustained in a motor vehicle accident. (Dec. 6.) The judge further found the employee partially incapacitated as of December 4, 1991, the date on which Dr. Coleman, whom the judge adopted, opined she was capable of light duty, and continuing. The judge therefore assigned the employee an earning capacity of $250.00 per week. (Dec. 6.)

On the issue of vocational rehabilitation, the judge made the following subsidiary findings:

> At the Conference on July 11, 1991, the Employee was referred to the Office of Education and Vocational Rehabilitation for evaluation and was subsequently found to be eligible for such services. As the Self-Insurer declined to provide such services, the Department of Industrial Accidents will bill the Self-Insurer a minimum of twice the program costs upon successful completion of a rehabilitation program. (Dec. 5-6.)

The self-insurer argues that these findings should be stricken from the decision as beyond the authority of the judge to make.

Section 30H [1] provides in pertinent part:

> If the insurer and employee *(sic)* fail to agree to a vocational rehabilitation program, the employee may apply to program, the employee may apply to the office of education and vocational rehabilitation for vocational rehabilitation services. *The office shall determine if vocational rehabilitation is necessary and feasible to return the employee to suitable employment. Such determination by the office shall be final and not subject to review by the board or reviewing board*, but, may be appealed to the commissioner. ...If, upon the completion of the program, the office determines that the program was successful and returned the employee to suitable employment, it shall assess the insurer no less than twice the cost incurred by the office and such assessment shall be paid into [the] trust fund. The insurer may contest any aspect of the assessment by filing a complaint with the division of dispute resolution. The injured employee shall not be a party to such proceedings. (Emphasis added.)

As the self-insurer argues, § 30H provides that OEVR, not an administrative judge or the reviewing board, makes the determination whether vocational rehabilitation is necessary and feasible. However, we do not find the administrative judge's reiteration of the procedure set out in § 30H as error in itself. The judge was not ordering vocational rehabilitation. If he had done so, he would have been acting beyond the scope of his authority. It is apparent that the judge understood the parameters of his authority by the following exchange that took place during the hearing:

EMPLOYEE COUNSEL: What I was not clear on was whether or not rehab was ordered by the Court or not at the last conference.

JUDGE: No. I cannot order rehabilitation. What I did was to refer her to rehabilitation.

(October 7, 1991 Hearing Transcript 46-47.) However, the only evidence that the self-insurer refused to pay for rehabilitation services was the statement of employee's counsel at hearing, albeit unrebutted by the self-insurer. See October 7, 1991 Hearing Transcript 45-46. Therefore, while we find no error in the administrative judge's reference to

[1] Applications for vocational rehabilitation services.

vocational rehabilitation, we find no evidence in the record to support the finding that the self-insurer declined to provide services, and so strike it.

The decision of the administrative judge is affirmed in all other respects.

Judges McCarthy and Wilson concur.

CASE # 2 Proposition # 1

Raposo v. William Wetmore Co., 9 Mass. Workers' Comp. Rep. 30 (1995).

The administrative judge erred in determining that vocational rehabilitation was not warranted. Entitlement to vocational rehabilitation is resolved through the OEVR.

Board Numbers:057906-91 and 067493-88 January 31, 1995

CARLOS RAPOSO vs. WILLIAM WETMORE CO.
EMPLOYEE EMPLOYER

CNA INSURANCE COS.
INSURER

INA/CIGNA INSURANCE COS.
INSURER

REVIEWING BOARD: Judges Wilson, McCarthy, and Fischel.

APPEARANCES: Frank *J.* Ciano, Esq., for the employee.

Thomas Dinopoulos, Esq., for CNA.

Loran Lang, Esq. for CIGNA.

Employee appealed; decision affirmed, as amended with regard to vocational rehabilitation.

1. **STANDARD FOR REVIEW**
It is the settled duty of the hearing judge to make such specific and definite findings based on the evidence reported as will enable an appellate board to determine with reasonable certainty whether correct rules of law have been applied;
Crowell v. Penn Motor Express, 7 Mass. Workers' Comp. Rep. 3 (1993)

2. **EXPERT TESTIMONY**
It is well within the administrative judge's authority to adopt part, all or none of the testimony presented by a medical expert.
Amon's Case, 315 Mass. 210 (1943)

3. **VOCATIONAL REHABILITATION**-Determination
It was error for an administrative judge to make a finding with regard to the necessity of vocational rehabilitation of an employee. Any entitlement of an employee to vocational rehabilitation will be resolved through the Office of Education and Vocational Rehabilitation.
Jones v. Bob Weiner Tire Co., 2 Mass. Workers' Comp. Rep. 265 (1988)

OPINION

WILSON, J.

On October 19, 1988 the employee, while making a delivery in the scope of his employment, suffered an injury when he dropped a heavy object on his right ankle.

INA/CIGNA Insurance Companies paid compensation benefits until early 1989, when the employee returned to work. Subsequent to the employee's return, he treated with several physicians for pain and swelling in his ankle. On October 30, 1991, the employee suffered another injury to the same ankle. CNA Insurance Companies insured the employer at the time of the 1991 injury. The employee underwent surgery to his right ankle on December 3, 1991, and has not returned to work since the second injury date. The employee filed claims against both insurers.

The administrative judge issued a conference order requiring CNA to pay compensation benefits for the period of October 30, 1991 through October 5,1992. The claim against CIGNA was denied. After a hearing, the administrative judge rendered an opinion granting weekly incapacity benefits under § 34 from October 30,1991 through December 3,1991 to be paid by CNA, and § 34 benefits from December 3, 1991 through September 30, 1992 to be paid by CIGNA. In addition, the administrative judge awarded partial incapacity benefits under § 35 from October 1, 1992 through January 19, 1993 to be paid by CIGNA. The employee appeals that decision.

"It is the settled duty of the hearing judge to make such specific and definite findings based upon the evidence reported as will enable this board to determine with reasonable certainty whether correct rules of law have been applied." *Crowell v. New* Penn *Motor Express*, 7 Mass. Workers. Comp. Rep. 3, 4 (1993) (citing *Zucchi's Case,* 310 Mass. 130,133 (1941)). In this case, the administrative judge satisfied this requirement.

The administrative judge found that the employee sustained personal injuries arising within the scope of his employment on October 19,1988 and on October 30,1991.
(Dec. 18). The medical opinions of Dr. Ready and Dr. Thrasher were adopted in part by the administrative judge in his determination that the employee was totally incapacitated from October 30, 1991 through September 30, 1992. (Dec. 16, 19). It is well within the administrative judge's authority to adopt part, all or none of the testimony presented by a medical expert. *Amon's Case,* 315 Mass. 210 (1943). The administrative judge found that, based on Dr. Thrasher's testimony, the surgery was causally related to the 1988 injury. (Dec. 12-13,15, 19) (Dep. of Dr. Thrasher, pp. 14-15,23-24,41-42), and that the total incapacity from October 30,1991 through December 3,1991 was causally related to the second injury. (Dec. 19) (Dep. of Dr. Thrasher, pp. 32, 40).

Dr. Ready pointed out that restrictions were placed on the employee as of September 30, 1992 based on his pain pattern. (Dep. of Dr. Ready, pp. 19-20). Adopting that testimony, the administrative judge determined that the employee had an earning capacity of $250.00 per week between September 30,1992 and January 19,1993.
(Dec. 16, 19). Adopting the medical testimony of the impartial physician, who examined the employee on January 19, 1993, the administrative judge stated, "it is clear from Dr. Cater's testimony that the Employee is able to engage in significant physical activity and I am convinced that the employee is fully capable of earning his average weekly wage." (Dec. 17) *(See* Dep. of Dr. Cater, pp. 10-12). We are satisfied that the judge's findings and the record support the ultimate conclusions.

The administrative judge, however, determined "that vocational rehabilitation is not warranted in this case." (Dec. 20). This was error. "[A]ny entitlement of this employee to vocational rehabilitation shall be resolved. ..through the Office of Education and Vocational Rehabilitation. ..." *Jones v. Bob Weiner Tire Co.,* 2 Mass. Workers' Comp. Rep. 265, 268 (1988). A determination of suitability for vocational rehabilitation was not for the administrative judge to determine and we strike that portion of the decision as beyond the scope of his authority. G.L. c. 152, § 11C. The decision is affirmed in all other respects.

So ordered.
Judges Fischel and McCarthy concur.

CASE # 3 Proposition # 1

Oriol v. LG Balfour Company., 14 Mass Workers' Comp. Rep. (October 26, 2000).

The judge ordered one year of vocational rehabilitation. The reviewing board did not address the issue of the judge's authority to do so, because it was not raised on appeal by the parties. The reviewing board, however in footnotes 5 and 7 stated that OEVR has exclusive jurisdiction over VR pursuant to G.L. c.152, §§30G, 30H.

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 071461-91**

Amicle Oriol	Employee
LG Balfour Company	Employer
Liberty Mutual Insurance Company	Insurer

REVIEWING BOARD DECISION

(Judges McCarthy,Wilson and Smith)[1]

APPEARANCES

Michael A. Rudman, Esq., for the employee
Thomas G. Brophy, Esq., for the insurer at hearing
Andrew P. Saltis, Esq., for the insurer on brief

MCCARTHY, J. At the time of the administrative judge's decision, Amicle Oriol, the employee, was fifty years old. (Dec. 5.) We note that he attended secondary school in his native Haiti, but left prior to receiving a diploma.[2] (Tr. 6-7, dated Feb. 26, 1998; Dec. 5.) While in Haiti, Mr. Oriol attended a mechanic training school for two years but did not complete the full three-year course. He also tutored preschool children in mathematics and reading for one year prior to entering the Haitian Air Force. (Tr. 7-10, dated Feb. 26, 1998.) While in the Air Force, Mr. Oriol worked as a welder. (Tr. 10-11, 13, dated Feb. 26, 1998.) He came to the United States in 1984 and in 1988 started work for Balfour as a mudwell polisher. (Tr. 14, dated Feb. 26, 1998; Dec. 5.)

The parties stipulated that the employee was first injured on November 27, 1991.[3] He received § 34 benefits from that date to September 10, 1993. From September 11, 1993 to January 30, 1994, the employee received § 35 benefits based on an earning capacity of $180.00

[1] Judge Smith no longer serves as a member of the reviewing board.

[2] The employee testified that, at the time he discontinued his studies in Haiti, he was two classes short of obtaining a high school diploma. After coming to the United States, he attended classes to obtain a GED. At the time of the hearing, Mr. Oriol had not yet taken the necessary examination. (Tr. 6-7, dated Feb. 26, 1998.)

[3] On November 27, 1991, Mr. Oriol sustained an injury to his lower back while in the scope of his employment. (Dec. 3.) At some point in 1992, Mr. Oriol underwent a lumbar laminectomy. (Dec. 6.)

per week. The employee returned to modified work with the employer on January 30, 1994. On December 9, 1996, the employee left work and has not returned since. (Dec. 3.)

The employee filed a claim for reinstatement of § 34 benefits as of December 9, 1996. Following a conference, the employee was awarded § 35 benefits from December 9, 1996 to date and continuing, based upon an assigned earning capacity of $225.00 per week. Although both parties appealed the conference order, the insurer withdrew its appeal prior to hearing. (Dec. 3.)

On August 27, 1997, the employee was examined by Dr. Merlino under the provisions of § 11A. (Dec. 8.) Both the medical report and the physician's depositional testimony were admitted into evidence. (Dec. 2.) The § 11A examiner opined that the employee's prior lumbar laminectomy and subsequent conservative care did not improve his subjective complaints of pain. The doctor's diagnosis was status post lumbar laminectomy with excision of L/4 disc and residual postoperative bilateral sciatic neuritis secondary to postoperative scarring at the L/5 nerve root. Further, the § 11A physician opined that the condition found on exam was causally connected to the November 27, 1991 job injury, (Dec. 8), and that the employee was capable of sedentary physical activity that did not involve heavy lifting and/or repetitive bending, stooping, twisting or reaching, with a maximum lifting capacity to ten to fifteen pounds repetitively and twenty-five to thirty pounds occasionally. At deposition, the § 11A physician further restricted the employee's physical activities by limiting sitting to ninety minutes and by having him avoid prolonged walking and standing. Doctor Merlino thought that Mr. Oriol was at a medical end result and his condition permanent. (Dec. 9.)

Additional medical evidence was allowed for the period prior to the impartial examination. (Dec. 7.) The reports of Dr. Massand, the employee's treating physician, were submitted on behalf of the employee. No additional medical evidence was offered by the insurer. (Dec. 2.) Over the course of treatment, Dr. Massand prescribed medication, physiotherapy and home exercises and administered cortisone at the S1 joint and sacroiliac joint. Dr. Massand opined that the employee suffered from degenerative lumbar disc disease with bilateral sciatica, left more than right, with a questionable herniated disc recurrent in nature,

lumbar and lumbosacral instability and radiculopathy of the L5 nerve root.[4] (Dec. 7.)

Mr. Albert Sabella, a vocational expert, was called by the employee to testify at the hearing. (Dec. 1.) Mr. Sabella testified that the employee can read at a high school level, has no light or sedentary transferable skills and, because of his heavy accent, light or sedentary employment requiring interpersonal contact was impracticable. The vocational expert concluded that the combination of Mr. Oriol's inability to communicate clearly in English with the medical restrictions imposed by the § 11A examiner eliminated virtually all sedentary or light duty work. (Dec. 10.)

The administrative judge adopted the medical opinion of the 11A medical examiner. (Dec. 11, 14.) Additionally, the judge credited the medical opinion of the employee's treating physician as to the employee's condition prior to the impartial examination. (Dec. 14.) The judge went on to find that ". . . job prospects are so limited for light or sedentary work given his English speaking problems that it is more probable than not, that he could not obtain work in the general labor market which is substantial and not trifling." (Dec. 11.) However, she also found that the employee could read and understand English and was capable of attending "language/speaking classes" to improve his English speaking skills. (Dec. 11, 14-15.) The judge then concluded that Mr. Oriol was temporarily totally incapacitated from work.

Based on the finding that improved oral communication skills would enable the employee to obtain gainful employment within his physical restrictions, (Dec. 12-13, 15-16), the judge ordered the insurer to pay the reasonable cost of vocational rehabilitation services for up to one year.[5] The judge also ordered payment of § 34 benefits from December 9, 1996 to June 29, 1999, § 35 benefits from June 30, 1999 and continuing, benefits pursuant to § 30 and legal fees and costs to the employee. (Dec. 17-18.)[6] The judge directed the employee to make a good faith effort to participate in vocational rehabilitation and subsequent job placement, (Dec. 18), and noted that the failure of the employee or of the insurer to cooperate in vocational

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[4] The treating physician also made numerous notations regarding the employee's abnormal left heel gait and left sided limp. (Dec. 7.)

[5] The Office of Education and Vocational Rehabilitation (OEVR) has exclusive jurisdiction and responsibility for determining eligibility for vocational rehabilitation and for developing appropriate programs. See §§ 30G, 30H. Of necessity then, the English language program envisioned by the judge would be the responsibility of OEVR. See Perry v. Cape Cod Hosp., 9 Mass. Workers' Comp. Rep. 43 (1995). The issue of the judge's lack of authority to directly order vocational services was not raised by the parties.

rehabilitation and job placement ". . . would be new evidence for a successor administrative judge to consider in any request to modify benefits." (Dec. 18.)

Cross appeals were taken but the employee later withdrew his appeal. The insurer, in its appeal to us, raises a single issue. The insurer contends that it was arbitrary and capricious and therefore error for the judge to order temporary total incapacity benefits until June 29, 1999, a year and six days from the June 23, 1998 filing date of the decision. The insurer maintains that the award of temporary total incapacity benefits should have ended no later than August 26, 1997, the date of the impartial physician's report. In support of its position, the insurer points out that the § 11A medical examiner found permanent partial medical disability but also felt that the employee was capable of performing light sedentary work.

We are not persuaded by the insurer's argument. The judge found that although the employee has the physical and mental capacity to perform light sedentary work, his inability to orally communicate effectively in the English language acts as a bar to such employment. This finding is grounded on the testimony of the vocational expert, Mr. Sabella. Sabella testified that the employee was capable of performing, ". . . some type of selective or isolated" sedentary work. (Tr. 25 5/4/98.) Mr. Sabella went on to testify that Mr. Oriol's ability to obtain employment was jeopardized by his heavy accent and inability to effectively communicate in English. The vocational expert concluded that given the medical restrictions and the communications barrier, Mr. Oriol ". . . for all practical purposes does not have a work capacity." (Tr. 22 5/4/98.) This medical and vocational testimony taken together adequately support the judge's finding that the employee was temporary totally incapacitated at the time of the hearing and when the decision was filed. The judge could have let the decision go at that and simply conclude that the employee was entitled to temporary total incapacity benefits to the date of the filing decision and continuing. Instead she attempted to fashion a remedy which would hopefully return the employee to the work force in a sedentary position after he had an opportunity to improve his oral English language skills.[7] She noted that the employee ". . . comes across as confident in himself (intellectually) and clear thinking. He has every skill necessary for interpersonal work except that his heavy accent interferes with his communication.

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[6] The decision was filed June 23, 1998.

[7] Again, it is the OEVR's responsibility to " . . . determine if vocational rehabilitation is necessary to return the employee to suitable employment." General Laws c. 152 § 30H.

His vocational rehabilitation needs are very specific. He needs to be able to speak English clearly and then he would be employable in light and sedentary work." (Dec. 11, 12.)

It is, of course, somewhat speculative to select a target of approximately one-year within which the employee is to improve his English and obtain sedentary work. But it is certainly no more speculative or arbitrary than an order of ongoing § 34 temporary total weekly benefits to continue indefinitely given the dynamic and changing nature of most medical conditions. Administrative judges more often than not issue such " open-ended" orders without challenge. Of course the insurer may at any time seek relief from its obligation by filing a complaint to terminate or modify the payment of weekly benefits if circumstances warrant such a filing.

The judge has clearly explained her conclusion in this case. In our view it was drafted with care and foresight. She has pointed out that it is open to the employee to file a claim for further weekly benefits or for the insurer to seek a further modification of them. The judge's decision is not arbitrary, capricious or contrary to law. Accordingly, we affirm it.

The insurer is ordered to pay a fee of $1,000.00 to employee counsel pursuant to the provisions of § 13A(6).

So ordered.

_____
William A. McCarthy
Administrative law judge

Filed**: <u>October 26, 2000</u>**

_____
Sara Holmes Wilson
Administrative Law

CASE # 4 Proposition #2

Atherton v. Steinerfilm. Inc., 11 Mass Workers' Comp. Rep. 114 (1997).

It was speculative for a judge to base a present incapacity determination not only on medical restrictions and present vocational factors, but also on the chance that an employee could obtain an earning capacity by vocational rehabilitation. In determining current incapacity a judge must look at an employee's existing vocational attributes and those that are within reason in a fairly definite time. The mere fact that an Individual Written Rehabilitation Plan (I.W.R.P.) has been created and the employee is willing to attempt it does not render the employee ineligible for permanent and total benefits and serves as no basis for decreasing her entitlement to benefits. See G.L.c.152. § 35D(5).

Board Number: 28411-90 January 31, 1997

HOLLY ATHERTON vs. STEINERFILM, INC.
EMPLOYEE EMPLOYER

COMMERCIAL UNION FIRE
INS. CO.
INSURER

REVIEWING BOARD: Judges Fischel, Kirby, and Wilson.

APPEARANCES: Edward J. Spence, Esq., for the employee.

Kimberly D. Crear, Esq., for the insurer.

Employee appealed; case recommitted for further findings.

1. TOTAL AND PERMANENT INCAPAC1TY—Determination of—Retraining—Speculation on Effects of—M.G.L. c. 152, § 34A

A judge is not at liberty to speculate on possible future changes based on retraining that has not occurred.

2. TOTAL AND PERMANENT INCAPACITY—Determination of—Retraining—Speculation on Effects of—M.G.L. c. 152, § 34A

Where the administrative judge found, based on his opinion that if the employee were to undergo vocational retraining she would be able to return to work in the open market, that an award of total and permanent disability benefits under § 34A was premature, the reviewing board remanded the case for further findings.

3. **TOTAL AND PERMANENT INCAPAC1TY**—Determination of—Future Vocational Capacity—Speculation

The possibility that an employee's future vocational capacity could improve does not bar a finding of permanent and total incapacity. *See Lauble's Case,* 341 Mass. 520 (1960)

4. **TOTAL AND PERMANENT INCAPACITY**—Vocational Rehabilitation Plan—Not a Bar to Permanent and Total Incapacity Benefits

The fact that a vocational rehabilitation plan has been created for and accepted by an employee does not render the employee ineligible for permanent total incapacity benefits and serves no basis for decreasing the employee's entitlement to benefits.
See Hachadoorian's Case 329 Mass. 625 (1953)

5. **TOTAL AND PERMANENT INCAPACITY**—Burden of Proof
It is not necessary for an employee to prove complete physical or mental incapacity to be eligible for total and permanent disability benefits. It is enough that the evidence shows that the employee is unable to perform remunerative work of a substantial nature. *Frennier's Case*, 318 Mass. 635 (1945)

6. TOTAL AND PERMANENT INCAPACITY—Definition of—M.G.L. c. 152, § 34A
A disability is considered to be "permanent" if it will continue for an indefinite period that is likely never to end, even though recovery at some remote or unknown time is possible. If recovery is reasonably certain after a fairly definite time, the disability cannot be classed as permanent.
This definition of "permanent" applies when an employee seeks permanent and total incapacity benefits under § 34A.
Yoffa v. Metropolitan Life Ins. Co., 304 Mass. 110 (1939)
Himmelman v. A.R. Green & Sons, 9 Mass. Workers' Comp. Rep. 99 (1995)
DiMaggio v. Miles-Chrysler-Plymouth, 2 Mass. Workers' Comp. Rep. 299 (1988)

7. TOTAL AND PERMANENT INCAPACITY —Change in Circumstances—Future Inquiry
A finding of permanent and total incapacity does not forever bar inquiry into the extent of incapacity.
Dimaggio v. Miles-Chrysler-Plymouth, 2 Mass. Workers' Comp. Rep. 299 (1988)

OPINION

FISCHEL, J .

The employee appeals the administrative judge's decision denying her claim for G.L. c. 152, § 34A, permanent and total incapacity benefits, contending it was arbitrary, capricious, and contrary to law. We agree that the decision contains internal inconsistencies and misapplies the vocational criteria under *Scheff1er's Case*, 419 Mass. 251, 256 (1994).

The employee, Holly Atherton, sustained an industrial injury on May 23, 1990, by aggravating an underlying condition in her right arm while performing her duties at Steinerfilm (employer). (Dec. 2-3.) She never returned to work. (Dec. 2.) The employee underwent three surgical procedures, despite which the judge found her right major arm to remain "basically useless." (Dec. 2.) He found her to have "constant pain in the forearm, and numbness into the fingers." (Dec. 2.)

The insurer accepted initial liability and began G.L. c. 152, § 34, temporary total incapacity payments. (Dec. 2; Insurer's Brief, 1.) The case came before the administrative judge on the insurer's motion to discontinue, which the judge denied. (Dec. 2.) During the pendency of the insurer's appeal of that order, the employee exhausted her § 34 temporary total benefits and filed for G.L. c. 152, § 34A, permanent and total incapacity benefits. That claim was joined at hearing with the insurer's appeal. *Id.*

A hearing *de novo* commenced on November 17, 1995. An impartial physician, Dr. White, examined the employee pursuant to G.L. c.152, § 11A, and diagnosed long-standing chronic lateral epicondylitis aggravated by several work-related injuries and surgeries. (Dec. 3.) Dr. White attributed her continuing lateral epicondylitis to her May 23, 1990, work injury, which was responsible for her chronic elbow pain. *Id.*

Adopting the § 11A opinion, the judge concluded that the employee's "work injury of May 23,1990, continues to be a major factor in her continuing arm problems and restrictions." [1.] (Dec. 3.) The judge found that the she no longer could perform either the repetitive work performed for this employer or her limited past work that included hands-on food preparation, which is "clearly not within her present capabilities." (Dec. 3.) He found that because of limitations caused by the May 23, 1990, work injury "any sort of re-employment [was] problematic." (Dec. 4.) The judge found that her "physical condition ...is likely to be permanent." (Dec. 4.)

The judge concluded that "[a]t this time she appears to be totally disabled from the work force." (Dec. 4.) He further stated in his general findings: "I find that [the employee] remains totally disabled from the open labor market as a result of her work injury of May 23, 199[0]." (Dec. 5.)

The judge found that "[s]ince the date of her injury, Ms. Atherton has completed her G.E.D., and taken a few computer courses. However, due to her inability to use her right hand because of the numbness, computer work is problematic for her." (Dec. 3.) He found that the employee "has actively sought vocational counseling and retraining, but a recommended vocational retraining plan has not been funded by the insurer." *Id.*

Funding of a vocational retraining program has no relevance in earning capacity analysis. See G.L. c. 152, § 35D(5) (as amended by St.1991, c. 398, § 65).

Despite his finding that she was totally disabled, the judge denied the employee's claim for § 34A permanent total incapacity benefits and limited her entitlement to § 35 partial incapacity benefits, stating that "[w]hile I find the physical restrictions are likely to remain permanent, I find that vocational factors are not likely to remain so, given that a vocational rehabilitation plan has been created for her, and she is willing to attempt it." (Dec. 5.)

The employee appeals this decision. The employee contends that internal inconsistencies and erroneous application of law render the judge's decision arbitrary, capricious, and contrary to law. We agree. There are clear inconsistencies in the decision: the judge finds the employee has no present earning capacity and that she is totally disabled for work. (Dec. 4, 5.) Despite finding her presently lacking an earning capacity, he assigns incapacity benefits based upon an earning capacity. (Dec. 4.)

[1.] The employee here would be treated "as is," since "several work related injuries" were sustained prior to the present injury. (Dec. 3.)

In his decision, the judge reasoned that "what does not seem to be permanent in terms of employment for this employee is the vocational outlook. ..." and therefore "[a]ssuming [vocational re- training] is undertaken, then permanent disability from the open market cannot be assumed, and an award of total and permanent disability benefits under Section 34A is premature." (Dec. 4.) The judge assumes that the employee's present incapacity determination should be based not only on her present physical restrictions and present vocational factors but should also include the chance that she could undergo vocational rehabilitation that could create earning capacity. In the absence of further findings, this appears speculative.

The goal of disability adjudication is to make a realistic appraisal of the medical effect of physical injury in view of an employee's particular vocational situation. See *Scheffler's Case, supra,* at 256; *Frennier's Case,* 318 Mass. 635, 639 (1945); *Lally v. K.L.H. Research & Development,* 9 Mass. Workers' Comp. Rep. 427, 429 (1995). Thus, in realistically determining the current incapacity of Holly Atherton for work, the judge must look at her existing vocational attributes, and those that are within reason in a fairly definite time. See *Yoffa v. Metropolitan Life Ins. Co.,* 304 Mass. 110, 111 (1939). But the judge is not at liberty to speculate on possible future changes based on retraining that has not occurred.

The possibility that the employee's future vocational capacity could improve does not bar a finding of permanent and total incapacity. See *Lauble's Case,* 341 Mass. 520, 523 (1960) ("It is no bar to finding of the fact [of entitlement to §§ 34, 34A, 35 or § 36 benefits] in such cases that there is *possibility* that the claimant's condition will improve [citations omitted] or that a risky operation may improve it."). Thus, the mere fact that"a vocational rehabilitation plan has been created for [the employee], and she is willing to attempt it" (Dec. 5.) would not ordinarily render her ineligible for permanent total incapacity benefits and serves no basis for decreasing her entitlement to benefits. See *Hachadoorian's Case,* 329 Mass. 625, 630-631 (1953). The decision was thus error.

As to the employee's burden of proving each element of her permanent total incapacity claim, "[c]omplete physical or mental incapacity of the employee is not essential to proof of total and permanent disability. It is sufficient if the evidence shows that the employ- ee's disability is such that it prevents him from performing remunerative work of a substantial and not merely trifling character. ..." *Frennier's Case,* 318 Mass. 635, 639 (1945). Here the judge did find her . " physical condition. ..is likely to be permanent." (Dec. 4.) In *Yoffa v. Metropolitan Life Ins. Co., supra,* the court defined the word "permanent" in an action for disability benefits under a policy of life insurance:

> The word .'permanent'. is the opposite of temporary or transient. It is not a synonym for eternal. endless or life long. For example, a contract for permanent employment gives no right to employment for life. See the cases collected in *Weiner v. Pictorial Paper Package Gorp.*. 303 Mass. 123, 133.134. Under an insurance policy, a disability is permanent if it will continue for an indefinite period which is likely never to end, even though recovery at some remote or unknown time is possible. But if recovery is reasonably certain after a fairly definite time, the disability cannot be classed as permanent.

Id. at 111. This definition of "permanent" applies when an employee seeks permanent and total incapacity benefits under § 34A. *Himmelman v. A.R. Green & Sons,* 9 Mass. Workers' Comp. Rep. 99, 101 (1995); *DiMaggio v. Miles-Chrysler-P]ymouth,* 2 Mass. Workers' Comp. Rep. 299, 301 (1988); *Burrill v. Litton Industries,* 11 Mass. Workers' Comp. Rep. (1997). A finding of permanent and total incapacity does not forever bar inquiry into the extent of incapacity. *Id.* at 301. In the event that an employee's actual medical or vocational circumstances change, further proceedings can be pursued.

We recommit this matter to the administrative judge for further findings consistent with this opinion.

So ordered.

Judges Kirby and Wilson concur.

CASE #5 Proposition #2

Satoris v.Business Express., 11 Mass. Workers' Comp. Rep. 644 (1997).

Where a partially incapacitated employee devoted over 40 hours per week to a mandatory vocational rehabilitation program, it was arbitrary for an administrative judge to find that her physical tolerance to engage in a rigorous course of study as a basis for assigning of a $300 earning capacity. The fact of physical tolerance to engage in a vocational rehabilitative course of study is an inproper basis for the earning capacity assignment. See § 35D(5). Participation or enrollment in a vocational rehabilitation program under G.L. c. 152, § 35D(5) cannot be used as a basis for assigning an earning capacity.

Board Number: 027546-94 December 24, 1997

MURIEL SATORIS vs. BUSINESS EXPRESS
EMPLOYEE EMPLOYER

FIDELITY & CASUALTY
INS. CO.

INSURER

REVIEWING BOARD: Judges Levine, Wilson. and Fischel.

APPEARANCES: Wayne A. Gallo, Esq., for the employee.

John G. Preston. Esq., for the self-insurer.

Employee appealed; decision reversed.

1. EARNING CAPACITY—Assignment of—Participation in Vocational Rehab Program—Error
The reviewing board found that it was arbitrary for a judge to find that a partially incapacitated employee, in addition to devoting full time to a mandatory program of vocational rehabilitation, has the capacity to work enough additional time each to earn $300.00.

2. **EARNING CAPACITY** —Assignment of—Participation in Vocational Rehab Program—Employee Held to Higher than Necessary Standard
The reviewing board found that it was irrational for an employee to be found to have a $300.00 per week earning capacity while at the same time participating in a required vocational rehabilitation program that involved 40 hours of her time per week.
See Murphy v. *T.W.A.*, 11 Mass. Workers' Comp. Rep. 94 (1997)

3. **EARNING CAPACITY**—Participation in Mandatory Vocational Rehab Program—Good Faith Efforts
The reviewing board found that the "insurer cannot complain of reasonable efforts made in good faith by the employee to better [her] future position in life," referring to an assignment of an earning capacity to an employee who was already spending 40 hours per week participating in a required vocational rehabilitation program.
Paltsios's Case, 329 Mass. 526 (1952)
Khachadoorian's Case, 329 Mass. 625 (1953)

4. EARNING CAPACITY—Participation in Mandatory Vocational Rehab Program—M.G.L. c. 152, § 35D(5)
"The fact that an employee has enrolled or is participating in a vocational rehabilitation program paid for by the insurer or the department shall not be used to support the contention that the employee's compensation should be decreased in any proceeding under this chapter."

OPINION

LEVINE, J.

The employee appeals from a decision of an administrative judge reducing her weekly incapacity benefit payments for her accepted industrial accident.[1.] The employee argues that the judge erred by assigning a $300.00 weekly earning capacity when the employee's individual written rehabilitation program (IWRP) under 452 C.M.R. 4.07 caused her to spend well over forty hours each week carrying out the program. (Employee Ex. 2.) We agree, and reverse the judge's assignment of the $300.00 weekly earning capacity.

The employee, a flight attendant, sustained an industrial injury on June 14, 1994, when she fractured her right heel while performing safety exercises. (Dec. 4.) She was fifty-eight years old at the time of the hearing. (Dec. 3.) The insurer accepted liability for the injury, and commenced § 34 temporary total incapacity payments. (Dec. 3.) In September 1995, pursuant to the provisions for vocational rehabilitation contained in
G.L c. 152, §§ 30E-30H, the employee enrolled in an Associates Degree program in drug and alcohol counselling at the Northshore Community College. (Dec. 5; Employee Exhibit 2, "OEVR Individual Written Rehabilitation Plan. " Tr. 49-50.) The judge found that the program "involves a relatively grueling class and internship schedule." (Dec. 5.) The program entails three hours of class attendance, three to four days per week; at least four hours per day studying;[2.]
approximately ten hours per week commuting and approximately sixteen hours per week working in an unpaid internship.
(Dec. 5; Tr. 14-20, 49-50.) The employee maintained a 3.94 cumulative grade point average in her degree program. (Dec. 5.)

The insurer brought a complaint to discontinue or modify weekly benefits, which the judge denied at the § 10A conference. The matter then went to a hearing. (Dec; 2.) Pursuant to G.L. c. 152, § 11A(2), the judge allowed additional medical evidence.
(Dec. 3.) The judge determined, based on the testimony of the employee's medical ex- perts, that the employee remained partially disabled from work requiring prolonged standing, stooping or lifting. (Dec. 7.) The employee's partial disability was due to her lower right extremity problems and causally related to her work-related right heel fracture. (Dec. 7-8.) The judge concluded, as of the last examination of the employee by her expert neurologist on October 9, 1996, that the employee's medical condition had improved, and that she was no longer totally disabled. (Dec. 8; Employee Ex. 4.) The judge also found, based on the employee's credible testimony, that she had a partially completed Associates Degree and the physical tolerance to engage in a fairly rigorous course of study. (Dec. 5, 8.) The judge concluded that the employee's motivated efforts to return to the work force, as shown by her successful performance (3.94 grade point average) in her vocational rehabilitation program, supported the assignment of an earning capacity. *Id.* The judge therefore reduced the employee's

[1.] The decision also substantially increased the employee's average weekly wage.
(Dec. 9.) There is no issue before us as to that.

[2.] The judge found that the employee "studies most of the days and attends classes for 3 hours at night." (Dec. 5.)

weekly benefits from § 34 to § 35 as of October 9, 1996, with an assigned weekly earning capacity of $300.00. (Dec. 8.)

The employee contends that the judge's assignment of an earning capacity in the present circumstances was erroneous. Under the statutory provisions, the employee could not refuse to meet with the office of education and vocational rehabilitation, without jeopardizing her benefits. § 30G. After being deemed suitable for vocational rehabilitation, the employee was required to undergo the prescribed program, or lose fifteen percent of her weekly benefits. *Id.* The employee's IWRP, which the insurer signed, was an exhibit at the hearing. (Employee Ex. 2.) The judge credited the employee's testimony concerning the amount of time she devoted to carrying out the IWRP, which included time to attend classes, study, commute, and do an internship. This time commitment exceeded forty hours per week. (Dec. 5; Tr. 14-20, 49-50.)

We think that it is arbitrary to find that the partially incapacitated employee in the present case, in addition to devoting full time to a mandatory program of vocational rehabilitation, has the capacity to work enough additional time each week to earn $300.00. The judge's determination to that effect was an implicit finding that the employee was capable of holding the equivalent of two jobs. We do not think the partially incapacitated employee, however well motivated she obviously is, should be held to such a rigorous schedule. See *Murphy v. T.W.A.*., 11 Mass. Workers' Comp. Rep. 94, 103-104 (1997) (board concluded no rational basis for the judge's finding that the employee could work up to eighty hours per week, which assumption was the basis for earning capacity assignment). Cf. *Zatsos v. Borden Resinite,* 11 Mass. Workers' Comp. Rep. 60,63 (1997) (board recommitted case for reexamination of incapacity due to change in light duty job from eight-hour shifts to twelve-hour shifts). Upon completion of the vocational rehabilitation program in December 1997, the employee will be in a position to use her new training to earn substantial wages, perhaps in amounts equal to or greater than her pre-injury average weekly wage. "[T]he insurer cannot complain of reasonable efforts made in good faith by the employee to better [her] future position in life." *Paltsios's Case*, 329 Mass. 526, 528 (1952).

The judge's finding that the employee had the physical tolerance to engage in a rigorous course of study is not an adequate basis for the assignment of the $300.00 earning capacity. "The fact that an employee has enrolled or is participating in a vocational rehabilitation program paid for by the insurer or the department shall not be used to support the contention that the employee's compensation should be decreased in any proceeding under this chapter." G.L. c. 152, § 35D(5). In appropriate circumstances, courts have not viewed educational advancement and career training as evidence of earning capacity. See, e.g., *Paltsios's Case, supra,* at 528 (affirming award based on total incapacity, the court stated, "It is true that he has not performed any work since the injury, but that might well be ascribed to the fact that he was attending school"); *Khachadoorian's Case,* 329 Mass. 625, 629-631 (1953) (court affirmed permanent and total incapacity award and board's conclusion "that the employee's attendance at school in the circumstances did not relieve the insurer of liability"). The relevant question was whether the employee could spend well over forty hours each

week in a mandatory program of vocational rehabilitation, and still be able to earn $300.00 per week in addition to that activity. In the circumstances of this case, we consider that it is arbitrary to assign an earning capacity.

Accordingly, we reverse the decision and reinstate the employee's § 34 temporary total incapacity benefits.[3.]

So ordered.

Judges Wilson and Levine concur.

[3.] We are aware that the employee's § 34 benefits will have exhausted on June 14, 1997. The employee may now bring a claim for § 34A or § 35 benefits. Of course, when the employee has completed the IWRP or has otherwise altered or ceased her course of study, the demands of the IWRP may no longer affect her earning capacity.

CASE # 6 Proposition #3

Welch v. A.B.F. Systems., 9 Mass Workers' Comp. Rep. 407 (1995).

Enlarges on the Sartoris proposition.

The employee was re-trained and earned wages less than his former average weekly wage. Once a vocational rehabilitation program has been completed, the actual wages earned from a job that the employee was trained for could be factored in to an earning capacity analysis under G.L. c. 152, § 35D(1). An administrative judge cannot assign a higher earning capacity without explanation.

Board Number: 105649-86 April 26, 1995

WILLIAM WELCH
EMPLOYEE

VS.

A.B.F. SYSTEMS
EMPLOYER

INA/ CIGNA

INSURER

REVIEWING BOARD: Judges Kirby, Maze-Rothstein, and Smith.

APPEARANCES: James L. O'Brien, for the employee.

Lisa S. Molodec, Esq., for the insurer

Employee appealed; decision vacated and case remanded for hearing *de novo.*

1. **STANDARD FOR REVIEW—**Scope of authority—M.G.L. c. 152 § 11B Scope of authority of administrative judge is limited to deciding those issues in controversy.

2. **PROCEDURAL RULES AND REGULATIONS**
Before taking testimony in hearing, insurer must state grounds on which it seeks to modify or discontinue compensation; on all other issues, employee's rights under Workers' Compensation Act shall be deemed to have been established.

3. **TERMINATION OF BENEFITS**—Retroactive termination
Where insurer did not raise issue of employee's entitlement to benefits previously paid, judged erred in ordering retroactive termination of benefits.

4**. INCAPACITY ANALYSIS**—Evidence—M.G:L. c. 152, § 35D
Judge committed legal error in failing to utilize, for purposes of incapacity analysis, evidence of reduced wages from work for which employee was vocationally rehabilitated.

5**. BURDEN OF PROOF**
Burden of proof in workers' compensation case rests with claimant; burden is on employee to establish incapacity.
Sponatski's Case, 220 Mass. 526 (1915)
Foley's Case, 358 Mass. 230 (1970)
Mulcahey's Case, 26 Mass. App. Ct. 1 (1988)

6. VOCATIONAL REHABILITATION—M.G.L. c. 152, §§ 3OG, 3OH

Employee is entitled to vocational rehabilitation which is reasonable and necessary to return employee to suitable employment; employee seeking weekly wage replacement compensation has corresponding duty to mitigate wage loss by cooperating with vocational rehabilitation.

7. EARNING CAPACITY—Evidence—M.G.L. c. 152, § 35D(1)

Where employee has returned to full time employment for which insurer provided vocational rehabilitation training, wages from that job ordinarily reflect extent of employee's post-injury earning capacity; such post-injury earnings constitute prima facie evidence of employee's actual earning capacity, and judge cannot disregard them without explanation.

8. **EARNING CAPACITY-Evidence**
In determining effect of wages from post-injury employment for purposes of employee's post-injury earning capacity, judge should discuss whether post-injury job makes reasonable use of all of employee's mental and physical powers, and earnings reflect those paid for similar work in the competitive labor market.
Federico's Case, 283 Mass. 430, 186 N.E. 599 (1933).

OPINION

SMITH, J.

The employee appeals from a decision on a discontinuance complaint which ordered a retroactive termination of benefits more than two years prior to the date the complaint was filed. We find the judge's action beyond the scope of her authority, arbitrary and capricious, and contrary to law and therefore vacate the decision.

Procedural History

For more than three and a half years, the insurer paid the employee temporary total compensation benefits in a weekly amount of $360.50 pursuant to an Agreement which it filed with the Department on July 8. 1986. On December 27, 1989, the insurer filed a complaint for discontinuance or modification. A year later, the parties attended a conference pursuant to G.L. c. 152, § 10A. At conference, the employee requested a correction in the average weekly wage and asserted the right to ongoing partial compensation from October 15, 1990 at the rate of $360.50.

After the §10A conference, the administrative judge assigned an earning capacity of $350 per week, found that the pre-injury average weekly wage was $615.65, and ordered the insurer to commence partial incapacity compensation at the rate of $177.10 per week as of December 10, 1990, the filing date of the order. Only the employee appealed the conference order.

At hearing the employee reasserted his claim for partial compensation at the rate of $360.50 per week from October 15.1990, the date he began to draw a $135 per week salary from his post-injury job. He claimed that the average weekly wage on which his prior benefits had been calculated was $128.03 too low because it failed to include payments into the Teamsters Pension Fund, and Health and Welfare Fund. (Tr. 4.) He argued that, considering his education, training, work experience and other related factors, his earning capacity was considerably less than the $350 per week found by the judge at conference. (Tr. 5.)

The insurer responded with a different calculation of the average weekly wage. (Tr. 5-6.) With respect to the issue of earning capacity, the insurer stated in opening argument: "Mr. Welch presently runs My Travel Agency and certainly does have an earning capacity, and the $350 earning capacity is fair and reasonable and will be fair and reasonable based on the evidence that will be presented." (Tr. 6.) The insurer asserted no claim for overpayment and recoupment pursuant to G.L. c.152, §11D(2). The issues thus joined, the hearing commenced.

After the hearing and deposition were completed, the parties submitted closing arguments. The employee briefed the average weekly wage issue. (Memorandum of Law dated September 24, 1991.) The insurer's brief responded to the average weekly wage issue. (Insurer's brief received October 18, 1991.) The employee's response brief was limited to the average weekly wage issue. (Employee's Addendum to Brief dated December 17, 1991.) None of the post-hearing briefs framed an issue of the employee's entitlement to the benefits which had been paid *prior to* October 15, 1990.

In her decision, the judge correctly noted that the employee's claims were for § 35 partial incapacity benefits from October 15,1990 to date and continuing, and average weekly wage. (Dec. 2.)

In that section of the decision labelled "Subsidiary Findings of Fact", the judge merely recited evidence without making clear what evidence she believed to be true. She made " "Additional Subsidiary Findings" on the average weekly wage issue. She then wrote:

> Based upon the Foregoing Subsidiary Finding [sic] of Fact. and in consideration of the testimony and evidence presented including my observation of the Employee, his demeanor as a witness, and judging his veracity as well as taking into account his education, training, and work history and based on my knowledge as an Administrative judge, I find as follows:
>
> General Findings
>
> I find that the employee developed the condition of right knee pain as a result of his work activities during April 24,1986 while in the course of his employment with Arkansas Best Corporation. I adopt the opinion of Dr. Paul that the condition of the Employee's right knee since March 24, 1986 as well as any disability resulting there from [sic) are causally related to his work injury for which the Insurer has accepted liability, [sic]. I also adopt Dr. Paul's opinion that the Employee remains disabled form [sic] his former work as a truck driver involving loading and unloading of heavy materials due toe [sic] the condition of his right knee.
>
> Based on the reports of Dr. Paul and on my observation of the Employee at the conference and hearing, I find that the Employee is no longer disabled from all types of gainful employment in the open labor market. Dr. Paul opines and I so find that as of March 30,1987 the Employee was capable of performing some type of light duty work of a sedentary

> nature. I conclude therefore that the Employee's earning capacity as of March 30, 1987 is $300.00 per week. As to the issue of average weekly wage, I find that the Employee's correct average weekly wage is $627.71 per week.

(Dec.10-11.)

Despite the incapacity claim described in the "Claims and Issues" section of the decision, she ordered that: 1. "[t]he insurer is authorized to discontinue payment of Section 34 benefits to the Employee as of *March* 30, 1987 to date and continuing. The insurer is ordered to pay Section 35 benefits to the employee based upon an average weekly wage of $621.71 and an earning capacity of $300.00." (Dec. 11, emphasis supplied.)

Although the employee raised multiple issues on appeal, we address only the two which are dispositive.

Retroactive Termination of Benefits in Modification Case

The employee contends that the administrative judge's retroactive benefit termination should be reversed. The insurer posits no argument in defense of its backward reach prior October 15, 1990. We agree that the retroactive termination was erroneous.

The scope of authority of the administrative judge was limited to deciding those issues in controversy. G.L. c.152, §11B. Department rules provide that before taking testimony in a hearing, the insurer must clearly state the grounds on which it seeks to modify or discontinue compensation and "[o]n all other issues, the employee's rights under M.G.L. c.152 shall be deemed to have been established." 452 CMR 1.11(3). The insurer did not raise the issue of 'the employee's entitlement to the benefits previously paid by the insurer. Consequently, we hold that under the circumstances of this case, the judge erred in ordering the retroactive termination. See *Gebeyan* v. *Cabot's Ice Cream*, 8 Mass. Workers' Comp. Rep. 77, 79 (1994) ("Where there is no claim and, therefore, no dispute, we conclude that the judge strayed from the parameters of the case and erred in making findings on issues not properly before her.").

Incapacity Analysis

The judge found that the employee had an actual earning capacity in excess of the wages paid by the job for which he was vocationally rehabilitated. The following facts are undisputed: The insurer paid for vocational rehabilitation which consisted of an eight week course at Uni Globe Travel School in November 1988. Upon its completion at the beginning of 1989, Welch began to work at My Travel as an unpaid trainee. He began to draw a $135 per week salary from the agency in October 1990 after his wife purchased it. (Dec. 4-5; Employee's Brief 5; Insurer's Brief 4.) Although the judge recites this information in her "subsidiary findings", she fails to utilize it in her incapacity analysis. This failure constitutes legal error. Section 35D sets forth the incapacity analysis which a judge must follow. It provides in pertinent part:

> For purposes of sections thirty-four. thirty-four A and thirty-five, the weekly wage the employee is capable of earning, if any, after the injury, shall be the greatest of the following:
>
> (1) The actual earnings of the employee during each week;. ...
>
> (4) The earnings that the employee is capable of earning.

For cases applying § 35D see, among others, *Vernon* v. *Park Marion Nursing Center,* 4 Mass. Workers' Comp. Rep. 97, 99 (1990); *Alexander* v. *New England Telephone,* 7 Mass. Workers' Comp. Rep. 209, 210 (1993); *Seaman* v. *A.* T.& T. *Technologies,* 8 Mass. Workers' Comp. Rep. 67, 69 (1994); *Dombeck* v. *Smith* & *Wesson,* 8 Mass. Workers' Comp. Rep. 127, 129 (1994).

We recognize that the burden of proof in a workers' compensation case rests with the claimant, *Sponatski's Case,* 220 Mass. 526, 527- 28 (1915), and the burden is on the employee to establish incapacity. *Foley's Case,* 358 Mass. 230, 232 (1970); *Mulcahey's Case,* 26 Mass. App. Ct. 1, 3 (1988) and cases cited. However, the basis in law or logic to disregard evidence of reduced wages from work for which the employee was vocationally rehabilitated escapes us.

An employee is entitled to vocational rehabilitation which is reasonable and necessary to return the employee to suitable employment. G.L. c.152, §§30G and 30H. An employee seeking weekly wage replacement compensation has a corresponding duty to mitigate his wage loss by cooperating with vocational rehabilitation. G.L. c.152, §30G.[1.]

Where an employee has returned to full time employment for which the insurer provided vocational rehabilitation training, the wages from that job would ordinarily reflect the extent of his post-injury earning capacity. Such post-injury earnings constitute prima facie evidence of the employee's actual earning capacity. See G.L. c. 152, §35D(1). A judge cannot disregard them without explanation.

[1.] At the time of this decision. §3OG provided in pertinent part:

> The office of education and vocational rehabilitation shall contact and meet with each injured employee who it believes may require vocational rehabilitation services in order to return to suitable employment. Any such employee who refuses to meet with the office of education and vocational rehabilitation shall not be entitled to weekly compensation benefits during the period of such refusal

The section was amended in 1991 to add the following:

> An insurer may reduce by fifteen percent the weekly benefits payable to any employee deemed suitable for vocational rehabilitation services by said office when such employee refuses such services, during the period of such refusal. ..

Section 8(2) was also amended in 1991 to add subsection (f) and now reads as follows:

> An insurer paying weekly compensation benefits shall not modify or discontinue such payments except in the following situations:. ...
>
> (f) the insurer has received a communication from the office of education and vocational rehabilitation authorizing suspension or reduction of payment under section thirty G. ...

The judge should have discussed whether the post-injury job made a reasonable use of all the employee's powers, mental and physical and the earnings reflected those paid for similar work in the competitive labor market. See *Federico's Case*, 283 Mass. 430,432, 186 NE 599.600;88 A.L.R. 630 (1933). Were the employee's actual earnings low because he failed to seek suitable employment which was available in his community, because it was a family job with an artificial pay scale, or because he lacked the physical ability or vocational skills to earn more? If the former, then the conclusion on work capacity could properly be based on a disregard of earnings available from the post-injury job and an assessment of the earning capacity pursuant to §35D(4). If the latter, then it would be improper to disregard the wages paid by that post-injury job and his benefits should be calculated based upon them pursuant to §35D(1). See *McNeice* v. *Berkshire Medical Center*, 8 Mass. Workers' Comp. Rep. 246 (1994).

CONCLUSION

The decision fails to disclose reasoned decision making within the particular requirements governing a workers' compensation dispute. G.L. c.152, §11C. Therefore, we vacate it and remand.

Since the hearing judge no longer serves in the department, we return the case to the senior judge for reassignment to a different administrative judge for hearing *de novo* on the extent of the employee's incapacity on and after October 15, 1990. We suggest that in the interest of judicial economy and efficiency the case be decided, insofar as practicable and where there is no issue of witness credibility, on the transcript and extensive evidence admitted by the former judge. See *Nartowicz's Case*, 334 Mass. 684,686 (1956).
So ordered.

CASE #7 Proposition #4

Simoes v.Town of Braintree School Dept., 10 Mass. Workers' Comp. Rep. 772 (1996).

Defines the permissible parameters of a vocational expert testimony. The case stands for the proposition that, in the context of G.L.c.152, § 11A, where the 11A opinion is viewed as prima facie weight on the medical issues, the vocational expert may speak to aspects of the employees' physical and mental limitations where those limitations are arrived at on the basis of tests certified by the American Board of Vocational Experts.

At most, the vocational expert's opinion supplemented the § 11A doctor's opinion on impairment and causation. The vocational expert's "multifaceted analysis of work capacity" may therefore be credited over the "§ 11A doctor's sole medical opinion of a physical capacity to work." See Crosby v. Raytheon, 11 Mass. Workers' Comp. Rep. 620 (1997).

Board Number: 00644593 November 12, 1996

JOHN SIMOES
EMPLOYEE

vs.

TOWN OF BRAINTREE
SCHOOL DEPT.
EMPLOYER

TOWN OF BRAINTREE
SELF-INSURER

REVIEWING BOARD: Judges Maze-Rothstein, McCarthy, and Smith.

APPEARANCES: Lori Harling, Esq., for the employee

Brenda L. Bowen, Esq., for the insurer

Insurer appealed, case recommitted for further findings.

1. **SUBSEQUENT INJURY** —Non-work-related—Compensability
Where a work injury is followed by a disease process unrelated to employment, the determination of compensability is limited to incapacity caused not by the blend of the work injury and the after-occurring malaise, but by the work-related condition alone.
See Patient v. Harrington & *Richardson,* 9 Mass. Workers' Comp. Rep. 679 (1995)

2. **SUBSEQUENT INJURY**-Non-work-related—incapacity—Determination—Error
It was error for an administrative judge to have considered a non-work-related subsequent injury along with a work-related injury in determining the employee's earning capacity.
See Hummer's Case, 317 Mass. 617 (1945)

3. **IMPARTIAL MEDICAL EXAMINATION**—Prima *Facie* Evidence—Limitation
An impartial physician's report constitutes *prima facie* evidence only as to the issues of medical disability and related medical matters. As to any other aspect of a report, including opinions on an employee's ability to perform a specific job the administrative judge must accord appropriate weight to the evidence on the basis of its probative value.
Scheff1er v. Sentry Ins., 7 Mass. Workers' Comp. Rep. 219 (1993)

4. ***PRIMA FACIE*** **EVIDENCE**-Limitation
Prima facie evidence maintains its artificial legal force only to a certain point.
Cook v. Farm Serv. Stores. Inc., 301 Mass. 564 (1938)
Anderson's Case, 373 Mass. 813 (1977)
See Mendez v. The Foxboro Co., 9 Mass. Workers' Comp. Rep. 641 (1995)

5. **IMPARTIAL MEDICAL EXAMINATION**-Prima *Facie* Evidence—Limitation

The weight of *prima facie* evidence, for purposes of § llA, ends either where it is overcome by other evidence or where the doctor's medical opinion ends and his or her nonmedical opinion begins.

See Scheff1er v. Sentry Ins., 7 Mass. Workers' Comp. Rep. 219 (1993)

6. **ATTORNEY'S FEE**—Employee Prevailed in Part—Recommittal—M.G.L. c152, § 13A(6) Where an employee prevailed on one issue on appeal, even though another issue was remanded for further findings, the reviewing board awarded the employee an attorney's fee.

OPINION

MAZE-ROTHSTEIN, J.

The insurer's appeal from a decision that left the employee's G.L. c. 152, § 34, temporary total incapacity benefits intact raises two issues for review. First, it argues that combining the industrial condition and an after-occurring, unrelated condition to reach an incapacity determination was error. We agree. For that reason the case is appropriate for recommittal. The second issue is of first impression. The insurer argues it is an error of law to consider certain aspects of the opinion of employee's vocational expert, because that opinion usurps the exclusive province of G.L. c. 152, § 11A, medical experts to provide medical evidence.[1.] We disagree and affirm the judge's use of expert vocational testimony.

In his custodial work for the town, the employee meant only to clear a school walkway for students following a snow storm, but wet snow and frozen sand clumps made the going rough. (Dec. 5, 6; Tr. 13.) At one point the plow hit a snow bank and Mr. Simoes injured his left shoulder. *Id.* The insurer accepted the claim. (Dec. 3, 5.) The employee was 65 years old when injured and had done heavy labor throughout his career. (Dec. 5.)

This case began with the insurer's complaint to modify benefits. A denial was issued on October 24, 1994, after a § 10A conference. The insurer appealed to a hearing *de novo.* (Dec. 2.)

At hearing, the judge credited the employee's testimony of continued left shoulder pain and of his inability to perform household chores. (Dec. .8.)

Medical testimony was given by the § 11A examiner, Richard Greenberg, M.D. (Dec. 8.) The doctor examined the employee on January 11, 1995. (Dec. 7-8.) He stated that though the employee suffered from rotator cuff tears in both shoulders, only the left shoulder related causally to the industrial accident. (Greenberg Dep. 7.) In his opinion,

[1.] General Laws c. 152, § 11A, gives an impartial medical examiner's report the effect of"prima facie evidence with regard to the medical issues contained therein," and expressly prohibits the introduction of other material medical evidence to meet it unless the judge finds that additional medical testimony is required due to the complexity of the medical issues involved or the inadequacy of the report. *O'Brien v. Blue Cross/Blue Shield,* 9 Mass. Workers' Comp. Rep. 16 (1995). *appeal docketed,* No.0758 (SJC October 30, 1995).

the left shoulder condition prohibited a return to custodial work, but he thought the employee had a physical capacity to perform sedentary work if he lifted no more than ten pounds. (Dec. 7; Greenberg Dep. 14.) This opinion was adopted.

On the vocational side of the incapacity quotient, the judge found probative the report and deposition opinion of the employee's vocational expert, Paul Blatchford, Ed. M. (Dec. 8.) It was expert Blatchford's opinion that the employee lacked transferable skills to successfully move to sedentary work. Moreover, when the expert administered various vocational tests, the employee's performance measurements in reading, spelling and arithmetic were relatively low. He also displayed a lack of manual dexterity upon testing. (Dec. 8; Employee's Exhibit 2, 5.)

Mr. Blatchford commented throughout his testimony on the employee's function in both shoulders. However, the expert noted that when considering the employee's intellectual limits and limited heavy labor work history, the impairment of the left upper extremity alone, exclusive of that on the right, would preclude the employee from performing even sedentary occupations. (Employee's Exhibit 2, 10.) .

Combining the lay, medical and vocational evidence, the judge concluded that based upon the employee's age, prior experience only as a laborer, and his inability to use "either" shoulder without impediment, he was totally and temporarily incapacitated. (Dec. 10.) The insurer's complaint was denied and § 34 benefits were continued. (Dec. 11.)

In its first charge of error the insurer contends the award of benefits could not legally hinge on the impairment in *both* shoulders. We agree. It is undisputed that the right shoulder impairment developed after and was not related to the industrial accident. (Dec. 6.) Yet the general findings looked to the employee's impeded use of "either" shoulder in assessing entitlement to total incapacity benefits. (Dec. 10.)

As we have recently reemphasized, where a work injury is *followed* by a disease process unrelated to employment—as distinguished from unrelated *pre-existing* conditions that combine with a work injury— the determination is limited to incapacity caused not by the blend of the work injury and the after-occurring malaise, but by the work- related condition alone. See *Patient v Harrington & Richardson,* 9 Mass. Workers' Comp. Rep. 679, 682-683 (1995). Compare the treatment of pre-existing conditions under the Act. G.L. c. 152, § 1 (7 A); *Robles v. Riverside Mgmt., Inc.,* 10 Mass. Workers' Comp. Rep. 191 (1996). In cases where medical conditions emerge after an industrial injury, judges must look "with something akin to tunnel vision and ...narrowly focus on and determine the extent of. ..harm. .. that is causally related solely to the work injury." *Patient, supra* at 683. Thus, incapacity due to the completely unrelated right shoulder condition cannot be considered in determining whether the condition of his work-injured left shoulder has rendered him totally disabled. See *Hummer's Case,* 317 Mass. 617, 623 (1945). See also Locke, *Workmen's Compensation* § 308, (2d ed. 1981). Consideration of both shoulders was an error of law. We therefore recommit the case for clarification of the conclusions on the effects of the left shoulder work injury without reference to the after-acquired and unrelated right shoulder condition.

Fixing on the dexterity test the vocational expert had the employee perform, the insurer next questions whether a vocational expert can render opinions that are medical in nature given the exclusivity of § 11A in that domain. After all, it asserts, the § 11A examiner opined that the employee's left upper extremity impairment left him with a sedentary work capacity.

Scheffler's Case, 419 Mass. 251 (1994), put the § 11A opinion in perspective and defined its limits. *Scheffler's Case, supra* at 256-257. In discussing the permissible assignment of very little weight to the § 11A doctor's opinion that Mr. Scheffler could return to his former work, the court noted with approval the reviewing board's conclusion that that aspect of the doctor's opinion was not to be considered expert. *Id.* at 260-261 n.6. The conclusion as stated by the reviewing board was:

> ...an impartial physician's report constitutes prima facie evidence only as to the issues of medical disability and related medical matters. As to any *other* aspect of a report, including opinions on an employee's ability to perform a specific job the administrative judge must. ..accord *appropriate weight* to the evidence on the basis of its probative value.

Scheffler v. Sentry Insurance, 7 Mass. Workers' Comp. Rep. 219, 222 (1993). (Italics in original, further emphasis added). For example, a § 11A doctor's medical opinion that an employee has a fifty percent loss of function in the spine would be afforded *prima facie* weight, whereas that same doctor's vocational opinion that the employee has a sedentary work capacity for clerical work exceeds his medical expertise and is ordinary evidence. This is because a clerical work ability entails an entire array of non-medical considerations beyond an individual's physiological or medical status. Thus, wherever a § 11A opinion steps into the vocational realm and goes beyond a description of the employee's medically based physical limitations that portion of his opinion is of no special legal significance. *Scheffler, supra*, at 277 (nonmedical matters can be relied on in proportion to their probative value but can not constitute *prima facie* evidence).

We are now asked to comment on the flip side-the limits of vocational expertise. Or more specifically, have they been exceeded here. We think not. While we generally agree that a vocational expert may not render medical opinions on causation and medical impairment, this did not happen here.[2.] The vocational expert stayed within his field to arrive at a vocational, not a medical opinion. His opinion was based on his interview with the employee,[3.] his own personal observations and his analysis of the employee's
performance in various intelligence, aptitude and dexterity tests certified by the Ameri- can Board of Vocational Experts. (Employee's Exhibit 2, 5.)

[2.] There is no conflict between the two opinions. Both the § 11A doctor, albeit with medical precision, and the vocational specialist agreed the employee had limited movement in his left shoulder. As for lifting restrictions, there is no indication that the judge relied on the vocational specialist's view of what the employee could lift over that of the § 11A opinion, which was adopted "in total.'. (Dec. 8.)
Finally, the doctor had no opinion on the employee's dexterity, so there was no conflict there either.

[3.]. As stated above, the judge credited the employee's complaints of pain and self professed limitations (Dec. 8) and apparently used that evidence in arriving at his award of weekly benefits.

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The intelligence and aptitude tests that the vocational expert administered unmistakably address the issue of the employee's transferable skills. That issue is not medical in nature. The expert's observations of the employee while he was undergoing the standard dexterity testing were also not medically based. See (Employee's Exhibit 2.) Without attempting to comment on the molecular, bio-chemical, causal or medical significance of what he saw, the vocational expert simply observed that the employee
"could not stand with extension of his left arm to pick up, hold, grip, grasp and twist and turn objects." *Id.*[4.] This observation speaks to body mechanics not medicine. It is unlikely that the American Board of Vocational Experts would certify dexterity tests for vocational specialists to perform and analyze if one required medical training to administer them and to interpret their outcome. Finally, the dexterity test neither usurped nor overlapped with the weight of the medical opinion since the § 11A physician administered no corresponding medical tests. At most it supplemented the § 11A impairment and causation opinion based on only shoulder tests, with nonmedical observations of what the employee could perform with his hands. Compare (Statutory Ex. 1. Greenberg Dep. 9-11) with Blatchord Dep. 19, 24-25.)

The expert used his observation of "difficulty in utilization of his left non-dominant arm and hand in any bimanual activity," and in sitting and bending forward, along with the reports of pain in many activities, to form part of his composite vocational opinion that the totality of the employee's deficits would preclude him from "performing and more importantly sustaining, sedentary entry level unskilled occupations." (Employee's Exhibit 2, 9.) It was the judge's prerogative to credit the vocational expert's opinion on a multifaceted analysis of work capacity over that of the § 11A doctor's solely medical opinion of a physical capacity to work, because the .. "determination of loss of earning capacity involves more than a medical evaluation of the employee's physical impairment." *Scheffler, supra* at 256. Impairment combines two elements: physical harm to the body, the medical element, with the employee's vocational strengths and weaknesses in the context of other economic concerns. *Id.* The § 11A opinion addressed the former, while the vocational opinion assessed the latter, thereby supplementing the medical view, with the vocational perspective.

The concurrence suggests that the entire vocational opinion should have been excluded because it relies in part on medical records that could not be admitted under
§ 11A. The issue of whether medical records can be used for non-medical purposes in a case that involves § 11A has yet to be decided. It seems reasonable that a vocational expert would need medical information to perform a workup of an employee.

[4.] . The dissenting portion of the concurrence suggests that as regards the dexterity test the expert changed his opinion about which was the employee's dominant arm. His opinion remained the same both before and after the deposition. He pointed out only that a typographical error appeared in his report in this regard. (Blatchford Dep. 18-19.) Moreover, on the next two deposition transcript pages immediately after that relied on by the concurrence, the vocational expert clarified that he both tested and observed the employee's lack of dexterity of the left industrially injured hand. (Blatchford Dep. 24-25.) And as stated above, it was expert Blatchford's opinion that the left side alone foreclosed the employee's sedentary job possibilities given his vocational background. (Employee ex. 2, 10. Blatchford Dep. 32, 34.)

There is no statutory requirement that a vocational expert be provided with the § 11A report, which may or may not even exist when a work-up is being performed. Thus, the vocational expert would have to get medical background information from somewhere. The concurrence's formulation would effectively eliminate vocational opinions from workers' compensation cases defeating the combined medical and vocational design of the Act. Section 11A was enacted to address the issue of opposing medical experts, we do not think it was meant to eliminate all vocational expertise as well.

As the courts have made clear, *prima facie* evidence maintains its artificial legal force only to a certain point. *Cook v. Farm Serv. Stores, Inc.*, 301 Mass. 564 (1938); *Anderson's Case,* 373 Mass. 813, 817 (1977). See *Mendez v. The Foxboro Co.*, 9 Mass. Workers' Comp. Rep. 641,645-646 (1995). For purposes of § 11A the assigned weight ends either where it is overcome by other evidence or where the doctor's medical opinion ends and his non-medical opinion begins. In the case at bar, the judge gave the medical portion of the § 11A opinion the artificial legal force which it is due. When the doctor opined that the employee could do ."clerical. ..work" he ventured into the employee's vocational capacity, at that point his opinion became ordinary evidence with *no* special legal weight. (Statutory Ex. 1.) See *Scheffler's Case, supra* at 260-261 n. 6. Vocational experts' opinions are evidence for judges to weigh in assessing how § 11A-based medi- cal disability impacts on the earning capacity of different individuals. *Scheffler's Case, supra* at 256. Indeed, the court in *Scheffler* instructed:

> After giving proper weight to the prima facie *and other evidence,* the administrative judge would then find the facts and apply appropriate legal standards to determine whether the employee has suffered a loss of earning capacity.

Id. at 257, (Emphasis added).

There was nothing contrary to law in allowing the . "other evidence" to supplement the *prima facie* status of the medical conclusions concerning the employee's condition; it simply provided more for the judge to use in conducting a *Scheffler* analysis to determine what effect the work injury had on this employee's chances of gainful employment.

We therefore affirm the judge's reliance on the vocational expert testimony. We recommit the case for further findings on what the left shoulder impairment alone does to the employee's ability to earn.

Because the employee prevailed on the issue regarding the vocational expert's testimony, we award an attorney's fee pursuant to G.L. c. 152, § 13A (6), in the amount of $1,000.00.

So ordered.

Judge McCarthy concurs.

SMITH, J. (CONCURRING)

The insurer appeals from the denial of its discontinuance request and raises three issues on appeal.[5.] I agree with the majority that the judge erred in considering the impact of the employee's non-work-related medical problems in assessing the extent of incapacity.

Although we part company on the second issue, it is likely that the first issue will be dispositive on remand because the employee's non- work-related medical problems with his dominant arm are inextricably woven into the vocational expert's opinion. The majority neglects the third issue which governs the approach to the vocational issue. Therefore I will commence my analysis by discussing the *prima facie* effect of the impartial medical opinion of work limitations.

Under the statutory scheme of the 1991 amendments to the workers' compensation act, the § 11A impartial medical examiner acts in a manner akin to a traditional master, rather than as an expert witness. See *Scheffler's Case,* fn. 6, 419 Mass. 251, 261, 643 N.E.2d 1023,1028 (1994) ("The board also considered whether the doctor's opinion should be considered as the opinion of an expert witness, concluding that it should not. We agree with that conclusion"). "The so-called 'impartial provisions' are designed to obviate the need in every case for reliance on the testimony of 'dueling doctors. ' " *Scheffler v. Sentry Insurance,* 7 Mass. Workers' Comp. Rep. 219, 224 (1993). The impartial medical examiner's report thus is the prism through which all medical information is shown to the trier of fact.

5. The three issues are listed in the insurer's brief as follows:

> 1. Whether a condition found by the administrative judge to have arisen after the industrial injury and to be unrelated to the employee's industrial injury may form the basis for an award of continuing benefits under G.L. c. 152 section 34?
> 2. Whether the admission of a vocational witness' test results and opinions concerning an employee's manual dexterity, and physical capacity violates the statutory mandate that the impartial physician, pursuant to G.L. c. 152 section lIA(2), determine the employee's physical capacity?
> 3. Was administrative judge required to accord prima facie weight to the impartial examiner's opinion that the employee was able to return to work full-time in a sedentary desk job where the insurer established that such positions were available within the employee's geographic area?

The impartial medical examiner has statutory authority to gather medical information,[6.] and to render an opinion relying upon it. His opinion constitutes " *prima facie* evidence" of "(i) whether or not a disability exists, (ii) whether or not any such disability is total or partial and permanent or temporary in nature, and. ..what permanent impairments or losses of function have been discovered, if any." G.L. c. 152, § 11A(2). All other means of admission of medical evidence are prohibited, unless the judge specifically allows additional medical evidence, which is not the case here. *Id.*[7.]

The impartial medical examiner's job is to describe the physical handicaps which the injury has caused. G.L. c. 152, § 11A(2); see 452 CMR 4.02, definition of. "functional limitations"; *Scheff1er's Case,* 419 Mass. at 256-257, 643 N.E.2d at 1026-1027. In common parlance, the impartial medical examiner sets the work limitations. "[T]he impartial medical examiner. ..describe[s] the employee's ability to perform certain tasks and. ..state[s] restrictions on the employee's ability to work." *Id.,* 419 Mass. at 257,642 N.E.2d at 1027 (1994). The job of the vocational counsellor is to take the restrictions given and help the employee to find suitable work. See G.L. c. 152, § 30G. A vocational rehabilitation counsellor is not a medical expert and lacks the qualifications to render an expert opinion on functional limitations.

In the context of litigation where the impartial medical examiner's report is the sole medical evidence allowed, see G.L. c. 152, § 11A(2), then the impartial medical report is the proper medical foundation for a vocational opinion. There is no danger of eliminating vocational opinions from workers' compensation cases. The only restriction is that vocational opinions cannot be used as a backdoor means of evading § 11A(2)'s strictures on the admission of dueling medical opinions. Vocational opinions must be based upon evidence which can be properly placed before the judge, just as any other expert opinion. .

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6. Section 11A(2) instructs the employee to provide the impartial medical examiner with "all relevant medical records, medical reports, medical histories, and any other relevant information requested." The failure to do so "without good reason, shall constitute sufficient cause for suspension of benefits pursuant to section forty-five." G.L. c. 152, § l1A(2).

7. Section llA(2) provides in pertinent part:

> Notwithstanding any general or special law to the contrary, no additional medical reports or depositions of any physicians shall be allowed by right to any party; provided, however, that the administrative judge may, on his own initiative or upon a motion by a party, authorize the submission of additional medical testimony when such judge finds that said testimony is required due to the complexity of the medical issues involved or the inadequacy of the report submitted by the impartial medical examiner.

St. 1991, c. 398, § 30.

A vocational opinion which is based on an improper foundation may be excluded. The opinion may not be based upon hearsay unless the hearsay is independently admissible. Liacos, Handbook of Massachusetts Evidence, § 7.10.2 (6th Ed., 1994). Here the vocational opinion was based upon medical records specifically made inadmissible by G.L. c. 152, § 11A(2). The insurer objected to its admission specifically on that basis. (Blatchford Dep. 7.) The judge erred in overruling the objection and admitting the vocational expert's report. (Dec. 4; Blatchford Dep. Ex. 2.) See *Flaherty v. Browning-Ferris Ind., Inc.,* 9 Mass. Workers' Comp. Rep. 630, 632 (" An administrative judge has no power to admit evidence at a hearing in a manner contrary to the department's rules"). The error was harmful as the judge relied on that evidence to decide the extent of incapacity, the central issue in dispute. See *Whalen v. Resource Management,* 9 Mass. Workers' Comp. Rep. 689, 691 (1995).

Furthermore, the judge improperly overruled objections to the results of the Crawford Small Parts Manual Dexterity Test. (Blatchford Dep. 23-24.) The left arm was the one injured on the job. The testing was done on the right arm. (Dep. 24.) The majority has correctly ruled in the first issue on appeal, that right arm limitations may not be used in assessing the extent of incapacity. Therefore, any limitations in right arm and hand manual dexterity are irrelevant. The objection on the basis of relevancy was erroneously overruled. (Dec. 4.)

The judge also erred in admitting the test results for the left arm. For an expert opinion to be admissible, it must be "have a reliable basis in the knowledge and experience of his discipline." *Daubert v. Merrell Vow Pharmaceuticals, Inc.,* 113 S.Ct. 2786, 2796.

> The overarching issue is "the scientific validity—and thus the evidentiary relevance and reliability—of the principles that underlie a proposed submission." Id. at—, 113 S.Ct. at 2797. The. ..judge has a significant function to carry out in deciding on the admissibility of a scientific expert's opinion. If the process or theory underlying a scientific expert's opinion lacks reliability, that opinion should not reach the trier of fact. Consequently, the judge must rule first on any challenge to the validity of any process or theory underlying a proffered opinion. ."This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." Id. at—, 113 S.Ct. at 2796. The judge thus has a gatekeeper role.

Commonwealth v. Lanigan, 419 Mass. 15, 26, 641 N.E.2d 1342, 1349.

Here, the vocational expert specified that the test was designed to measure manual dexterity of the *dominant* arm. (Blatchford Dep. 23.) Blatchford had reported that Simoes was left hand dominant. (Blatchford Dep. Ex. 5.) In fact, as Blatchford testified at his deposition, Simoes was right-handed. (Blatchford Dep. 18.) The judge failed to keep the gate of scientific validity closed when he admitted the test results for the non-dominant arm.

Using the improperly admitted evidence to conclude that the employee lacked dexterity of his non-dominant hand was arbitrary and capricious, and contrary to law, in light of the expert's opinion that the test was not designed for that purpose. The judge explicitly relied on the employee's lack of manual dexterity upon testing in awarding benefits and thus the evidentiary error was prejudicial. (Dec. 8.) See *Whalen, supra.*

For these reasons, I join in the majority vote to recommit the case for further findings of fact. It is my opinion that, in light of the passage of time during the pendency of the appeal, if either party alleges a change in medical condition or vocational skills since the date the record closed or the judge finds that justice so requires, the judge should take additional evidence prior to the entry of the remand decision.

CASE #8 Proposition #5

Quigley v. Raytheon Co., 10 Mass. Workers' Comp. Rep. 291 (1996).

The Reviewing board summarily affirmed the judge's finding that the insurer was justified in reducing the employee's compensation by 15% pursuant to § 3OG, where the reduction had been authorized by OEVR. The authority to determine a 15% reduction of an employees weekly compensation, in the first instance, lies solely with the Office of Education and Vocational Rehabilitation. See §8(2)(f).

Board Number: 062833-87 March 27,1996

ELIZABETH QUIGLEY VS. RAYTHEON CO.
EMPLOYEE EMPLOYER

LIBERTY MUT. INS. CO.
INSURER

REVIEWING BOARD: Judges Kirby, Maze-Rothstein, and Smith.

APPEARANCES: Mary Ann Calnan. Esq.. for the employee.

Joseph J. Durant, Esq.. for the insurer.

Employee appealed; decision affirmed in part, vacated in part, and case remanded for further action.

1. BURDEN OF PROOF—Entitlement

It is established law that the employee has the burden of proving medical causation and every other element of his or her claim.
Sponatski's Case, 220 *Mass.* 526 (1915)

2. BURDEN OF PROOF—Entitlement—Discontinuance Proceeding—M.G.L. c. 152, § 1(7A)

The burden of proving benefit entitlement does not shift from the employee; in a discontinuance proceeding it continues to rest on the employee.
Ginley's Case, 244 Mass. 2467 (1923) .
Harris v. Brockway-Smith Co., 9 Mass. Workers' Comp. Rep. 40 (1995)

3. BURDEN OF PROOF—Causality—Discontinuance Proceeding

In a discontinuance action, where the evidence raises the question whether the employee's continuing disability is due to the original work injury or to other causes, the employee must prove that the injury remains a cause.
Burn's Case, 298 Mass. 78 (1937)

4. BURDEN OF PROOF—Entitlement—Speculation

An employee cannot prevail at a hearing if essential elements of proof, such as causation, are left to surmise conjecture, guess or speculation.
Sponatski's Case, 220 Mass. 526 (1915)

5. BURDEN OF PROOF—Entitlement—Discontinuance Proceeding—Unpersuasive Evidence

Where evidence of continuing causation is lacking or does not persuade the judge of its truth, then the party with the burden of proof loses.
Gonzales's Case, 13 Mass. App. Ct. 1061 (1982)
See King's Case, 352 Mass. 488 (1967)

6. STANDARD FOR REVIEW—Modification or Termination of Benefits—Evidence Mixed—No Reversal

Where the evidence in the case was mixed and, depending on which medical expert is adopted, would support either an ongoing award of benefits or a termination, the reviewing board did not reverse the judge's decision.

OPINION

SMITH, J .

The employee appeals from a decision[1.] in a discontinuance action which terminated benefits as of the filing date of the decision. She seeks a restoration of the 15% weekly benefits which the insurer withheld pursuant to G.L. c. 152, § 30H, because she refused vocational services for which she was deemed suitable by the Office of Education and Vocational Rehabilitation. The employee argues that the administrative judge erred when he found the insurer justified in making such reduction and further erred in terminating her G.L. c. 152, § 35, partial incapacity benefits on the date of the decision. We summarily affirm the judge's § 30G and H determination. We find only the employee's latter argument meritorious.

Quigley sustained a personal injury to her back on August 27, 1987, arising out of and in the course of her employment as a carpenter for the Raytheon Company. The insurer paid § 34 total incapacity benefits until a conference order in February of 1988 assigned her an earning capacity of $300.00 per week.

In July 1991 the insurer filed a request for discontinuance based on an offer of suitable work. After conference in February 1992, the judge ordered a reduction from § 34 total compensation to § 35 partial compensation based on an average weekly wage of $603.06 and an earning capacity of $273.06 per week. Both parties appealed the conference order.

The judge joined the insurer's request to discontinue with the employee's § 30G claim. After conference, he denied both the claim and the discontinuance request. Both parties appealed for hearing *de novo.*

After several days of hearings, the administrative judge denied Quigley's request for reimbursement of compensation lost due to the application of § 30G and granted the insurer's request for discontinuance of all compensation. The judge found that the insurer was justified in reducing the employee's compensation by 15% pursuant to § 30G from June 1, 1992, to April 21, 1993, which had been authorized by the Office of Education and Vocational Rehabilitation (OEVR). We summarily affirm the decision on the 15% reduction, but hold that termination of all benefits on the date of the hearing decision lacked evidentiary support and was therefore arbitrary and capricious, and contrary to law.

[1.] The decision under review was filed on September 10, 1993. Almost two years later, on May 8, 1995, the judge apparently *sua sponte* filed an "addendum." As the addendum discussed substantive issues and was not requested by either party or the reviewing board, we know of no authority for the administrative judge to issue it. We therefore limit the scope of our review to the original decision.

The administrative judge found no causal relationship between Quigley's current back strain which continued to partially disable her, and the work-related injury six years prior. (Dec. 18.)

The judge found that the employee's current symptoms were caused by her underlying spondylolisthesis which had been aggravated by three post-injury pregnancies. (Dec. 19.) He wrote:

> Due to the nebulous nature of the recent medical opinion concerning causal relationship, no party has had any reliable information upon which to affix the date of the cessation of the causal relationship of the employee's back pain to the 1987 injury. The first definitive word in two years on the subject is this decision. Consequently, the employee would be unfairly prejudiced by a cessation date prior to the date of this decision. In fact, all of the legal pronouncements before today have told her unambiguously, that she was entitled to the compensation which she received. That being the case, it would be patently unfair. to deprive her of the funds already received. In addition, any other date that this Court would assign, prior to the issuance of this decision, would lack so much basis in fact as to be given it all of the quantities of fiction. Thus, the termination of the employee's compensation begins with the issuance of this decision.

(Dec. 19.)

In construing the absence of persuasive evidence against the insurer, the judge misapplied the burden of proof. It is established law that the employee has the burden of proving medical causation and every other element of her claim. *Sponatski's Case,* 220 Mass. 526, 527-528 (1915). Even though the discontinuance action was initiated by the insurer, it raises the same incapacity and causal relationship issues as are presented in an employee's original claim for compensation. The burden of proving benefit entitlement does not shift; in a discontinuance proceeding, it continues to rest on the employee. *Ginley's Case,* 244 Mass. 346, 348 (1923); *Harris v. Brockway-Smith Co.,* 9 Mass. Workers' Comp. Rep. 40, 41 (1995).

In a discontinuance action, where the evidence raises the question whether the employee's continuing disability is due to the original work injury or to other causes, the employee must prove that the injury remains a cause.[2.] *Burn's Case,* 298 Mass. 78, 79

[2.] For injuries occurring after December 23, 1991, the effective date of St. 1991, c.398. § 14, G.L. c. 152, § 1(7A), applies. It provides in pertinent part:

> If a compensable injury or disease combines with a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, to cause or prolong disability or a need for treatment, the resultant condition shall be compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.

(1937). The employee must go further than simply show a state of facts which is equally consistent with no right to compensation as it is with such right. She cannot prevail if essential elements of proof, such as causation, are left to surmise, conjecture, guess or speculation. *Sponatski's Case,* 220 Mass. at 528. Where evidence of continuing causation is lacking or does not persuade the judge of its truth, then the party with the burden of proof loses. *Gonzales's Case,* 13 Mass. App. Ct. 1061 (1982), *rev. denied,* 386 Mass. 1104 (1982); see *King's Case,* 352 Mass. 488, 492 (1967) (a preponderance of the evidence exists where a proposition is made to appear more likely or probable in the sense that *actual belief in its truth,* derived from the evidence, exists in the mind of the judge).

We hold that the administrative judge erred in terminating Quigley's § 35 benefits as of the date of the hearing decision. We therefore vacate that portion of the decision. Because the evidence in the case is mixed and, depending on which medical expert is adopted, would support either an ongoing award of benefits or a termination, we do not reverse. Compare *Medeiros v. San Toro Mfg.,* 7 Mass. Workers' Comp. Rep. 66,69 (1993) (reversal required when evidence supports only one result). Instead we remand for a new decision consistent with this opinion. Pending the remand decision, the existing termination order shall remain in effect. On remand, the judge shall determine whether it is more probable than not that the employee's incapacity continues to be causally related to the residual effects of the work injury.

So ordered.

Judges Kirby and Maze-Rothstein concur.

CASE #9 Propositon #5

Zirpolo v. RMR Title Co., 11 Mass. Workers' Comp. Rep. 280 (1997).

Follows the Quigley decision that it confirms OEVR's authority to determine a 15% reduction in an employee's weekly compensation.

The administrative judge had no authority under §3OG to address the issue of the employee's compliance with the agreed IWRP .Thus, it was error for the judge to reinstate the employee's full benefits, which had been reduced by 15% with the authorization of OEVR. The judge could order reinstatement of benefits only if he found that the claimant had demonstrated that no vocational rehabilitation program would be appropriate.

Board Number: 077610-89 May 21, 1997

RICHARD ZIRPOLO vs. RMR TILE CO
EMPLOYEE EMPLOYER

COMMERCIAL UNION INS.
INSURER

REVIEWING BOARD: Judges McCarthy, Maze-Rothstein, and Smith.

APPEARANCES: David McMorris, Esq., for the employee.

Vincent Tentindo, Esq., for the insurer.

Insurer appealed; decision reversed and case recommitted.

1. VOCATIONAL REHABILITION PLAN—Scope of Review—M.G.L. c. 152, § 30G
Section 30G confers upon an administrative judge the authority to reinstate compensation withheld under that section only upon finding that ."the claimant demonstrates that no vocational rehabilitation program of any kind would be appropriate for such claimant."

2. VOCATIONAL REHABILITATION PLAN—Scope of Review—Expanded—Error—M.G.L. c. 152, § 30G
Where an administrative judge reinstated compensation withheld pursuant to § 30G after determining that an employee had participated in a vocational rehabilitation program, the reviewing board reversed the decision. Under § 30G, compensation can only be reinstated if an employee can show that no vocational rehabilitation program of any kind would be appropriate for him or her.

OPINION

MCCARTHY, J.

The insurer appeals from a decision in which an administrative judge reinstated 15% of weekly compensation benefits withheld by the insurer pursuant to § 30G,[1.]

[1.] . G.L. c. 152. § 3OG, provides, in pertinent part:

> An insurer may reduce by fifteen percent the weekly benefits payable to any employee deemed suitable for vocational rehabilitation services by said office when such employee refuses such services, during the period of such refusal. ...Any employee aggrieved by a reduction in weekly benefits or the prohibition of a lump sum settlement under this section may file a claim for reinstatement of such benefits or removal of such prohibition; provided, however, that compensation shall not be reinstated nor the settlement allowed unless the claimant demonstrates that no vocational rehabilitation program of any kind would be appropriate for such claimant.

and awarded a 20% penalty under the provisions of § 8 (5).[2.] Because the judge expanded the scope of review set by § 30G, we reverse the decision and remand the case.

The insurer paid weekly § 35 partial incapacity benefits in this accepted case based on a November 4, 1989, work injury. (Dec. 2.) It also agreed to pay for vocational rehabilitation. After developing an Individual Written Rehabilitation Plan according to 452 C.M.R. 4.07, signed and approved by all parties, a licensed vocational rehabilitation provider commenced the required services. (Dec. 12; Employee's Ex. 3.) Some months later, the insurer sought to reduce the compensation being paid to the employee by 15%, pursuant to § 30G, because the employee refused the vocational rehabilitation services being provided. The Office of Vocational Rehabilitation granted the reduction (Dec. 15) and the insurer began withholding 15% of the employee's weekly § 35 incapacity payments on March 15, 1993. (Dec. 2.)

The employee then filed the present claim, also under § 30G, to reinstate the benefits withheld by the insurer, as well as for a penalty under § 8(5). The judge denied the claim at conference and the employee requested a hearing *de novo.* (Dec. 2.) The hearing decision reinstated the employee's full § 35 benefits, retroactive to March 14, 1993. (Dec. 16.) After assessing the merits of the insurer's contention that the employee had refused or failed to participate in the Individual Written Rehabilitation Plan, the judge found that the employee had, in fact, participated in the offered rehabilitation services. (Dec. 15-16.) Since Mr. Zirpolo had not refused vocational rehabilitation services, the judge determined that the granting of the insurer's request for a 15% reduction in payments by the Office of Education and Vocational Rehabilitation was error. (Dec. 16.) Moreover, because the insurer failed to give the employee seven days' notice of its intent to reduce compensation payments, the judge concluded that a 20% penalty was due on the additional compensation that she ordered, pursuant to § 8(5). (Dec. 17.) The insurer appeals to the reviewing board.

The insurer argues that the judge had no authority under § 30G to address the issue of the employee's compliance with the agreed Individual Written Rehabilitation Plan. The insurer is right. Section 30G expressly confers upon the administrative judge the authority to reinstate compensation withheld under that section *only* upon finding that "the claimant demonstrates that no vocational rehabilitation program of any kind would be appropriate for such claimant."

2. G.L. c. 152, § 8(5) provides., in pertinent part:

> Except as specifically provided above, if the insurer terminates, reduces, or fails to make any payments required under this chapter, and additional compensation is later ordered, the employee shall be paid by the insurer a penalty payment equal to twenty percent of the additional compensation due on the date of such finding. ...No termination or modification of benefits not based on actual earnings or an order of the board shall be allowed without seven days' notice to the employee and the department.

The judge's analysis of the merits of the employee's wrongful reduction claim, while cogent and articulate, did not answer the single question within the scope of her review under § 3OG. The statutory scheme drastically limits involvement by the division of dispute resolution in vocational rehabilitation issues. We therefore must reverse the decision, and remand the case for further proceedings. As the judge's award of additional compensation must fail, the award of a penalty under § 8(5) likewise fails.

Because the hearing judge no longer serves as such, we return the case to the senior judge for reassignment to another administrative judge for hearing anew.

So ordered.

Judges Maze-Rothstein and Smith concur.

CASE #10 Proposition #6

Stevens v. Northeastern University., 11 Mass. Workers' Comp. Rep.167 (1997).

Addresses jurisdiction over and treatment of a determination under the fourth paragraph of § 30. It reads:

> "In any case where an administrative judge, the reviewing board, the office of education and vocational rehabilitation or the health care services board is of the opinion that the fitting of an employee eligible for compensation with an artificial eye or limb, or other mechanical appliance, will promote his restoration to or continue him in industry, it may be ordered that such employee be provided with such item, at the expense of the insurer."

If, under the fourth paragraph of § 30, a judge finds that a specially equipped van will promote the employee's restoration to work, he must order the insurer to provide it or some reasonable equivalent as long as it is made necessary by the continuing effects of the industrial injury.

This case ruled that vehicles of transportation can be considered under the OTHER MECHANICAL APPLIANCE clause of § 30 to promote restoration to the work place.

Board Number: 08702789 February 21, 1997

WENDY ARACHNE STEVENS EMPLOYEE vs. **NORTHEASTERN UNIVERSITY** EMPLOYER

LIBERTY MUT. INSURER

REVIEWING BOARD: Judges McCarthy, Smith, and Maze-Rothstein.

APPEARANCES: J. Channing Migner, Esq.. for the employee.

Dennis M. Maher, Esq., for the insurer on appeal;
Marguerite S. O'Neil, Esq., for the insurer at hearing.

Employee appealed; decision reversed in part and case recommitted for further findings.

1. MEDICAL BENEFITS—Accepted lnjury—Causality Issue Not Relevant—M.G.L. c. 152, § 30
Where the insurer accepted liability for the work injury, there was no reason for the judge to refer back to whether there was a compensable work injury in deciding the § 30 medical services issue.
See Cirignano v. Globe Nickel Plating, 11 Mass. Workers' Comp. Rep. 17 (1997)

2. MEDICAL BENEFITS—Accepted Injury—Causality Issue Not Relevant—M.G.L. c. 152, § 30
Where a prior administrative judge ordered that a wheelchair was a compensable expense under § 30, and where the determination was not appealed, subsequent causation inquiry was limited.
See Franco v. Winston Restauront, 10 Mass. Workers' Comp. Rep. 645 (1996)

3. STANDARD FOR REVIEW—Wrong Causation Standard—Reversal—M.G.L. 11C
Where a judge's use of the wrong causation standard made the findings and the conclusion legally untenable, the causation finding was reversed.

4. STANDARD FOR REVIEW—Modified Private Transportation—Mechanical Appliance—Vocational Considerations—M.G.L. c. 152, § 30
Consideration of practical vocational questions such as availability of public transportation, the employee's place of residence, and where retraining and employment are located is necessary in order to reach whether contested transportation will have a positive effect on "an injured employee's ability to hold a job or obtain a new position." *Scheff1er's Case,* 419 Mass. 251 (1994)

5. IMPARTIAL MEDICAL EXAMINER—Medical Causation—Incapable of Rendering an Opinion—Additional Medical Evidence Required—Recommittal—M.G.L. c. 152, § 11A(2)

Where an impartial medical examiner was incapable of rendering an opinion on the medical causation question at issue, the administrative judge was ordered to require additional medical evidence on recommittal. *See* 0' *Brien's Case,* 424 Mass. 16 (1997); *Mendez v. The Foxboro Co.,* 9 Mass. Workers' Comp. Rep. 641 (1995); *Lebrun v. Century Markets,* 9 Mass. Workers' Comp. Rep. 692 (1995)

OPINION

MAZE- ROTHSTEIN , J .

To respond to this case of first impression we must examine the scope of the language, "other mechanical appliance," as it appears in the description of reasonable and necessary health care benefits. See G.L. c. 152, § 30. The judge denied the employee's claim for partial reimbursement of the cost of a specially equipped van. Ms. Stevens had argued a need for the modified van because her work injury required her to use a non-collapsible power wheelchair. The decision rests on two legal errors, thus we reverse in part and recommit the case for further findings. See G. L. c. 152, § 11C.

At the time of hearing, the employee was a thirty-one-year-old graduate student at Brandeis University. From early childhood she had been afflicted with reflex sympathetic dystrophy. This debilitating condition was first diagnosed when she was eight years old. By the time she reached eighteen she was confined to a wheelchair. (Dec. 4.) As a teenager she learned sign language interpretation. She signed for several organizations from 1984 to 1988. *Id.* In February 1989, while signing for deaf students at Northeastern University ("employer"), Ms. Stevens developed severe pain in her hands and wrists. She was unable to continue in her employment. (Dec. 5.)

The insurer accepted her claim for workers' compensation benefits due to her diagnosed condition of upper extremity cumulative trauma disorder. (Dec. 2, 6.) Conforming to a March 1992 order by a prior administrative judge, the insurer paid for the purchase of a power wheelchair to replace the employee's manual wheelchair, which she could no longer operate due to her upper extremity condition. (Dec. 5.)

The parties settled the weekly benefit portion of employee's case by lump sum agreement on December 10,1993. Under the agreement the insurer remained obligated to pay necessary and reasonable medical expenses. Some months later, in August of 1994, the employee purchased a van specially equipped with a wheelchair lift, hand controls, a specialized braking system and an adaptive driving program. *Id.* Prior to the industrial injury, the employee had used a modified Toyota, which accommodated her collapsible and thus more portable wheelchair. She could not fit her new power wheel-chair into the Toyota. (Dec. 7; Tr. 38-39.)

The employee claimed that the purchase and modification of the new motor vehicle was within the insurer's § 30 obligation to pay for a "mechanical appliance, [to] promote [the employee's] restoration to or continue [her) in industry. ..." G.L. c. 152, § 30. The insurer denied the claim, as did the judge after a § 10A conference. The employee appealed to a hearing *de novo.* (Dec. 2.)

On November 23, 1994, the employee was medically examined under the provisions of G.L.c. 152, § 11A. The § 11A examiner could make no definitive

diagnosis to account for the employee's six years of symptoms since the last cumulative trauma occurred. (Dec. 6)

On November 23, 1994, the employee was medically examined under the provisions of G.L. c.152, § 11A. The § 11A examiner could make no definitive diagnosis to account for the employee's six years of symptoms since the last cumulative trauma occurred. (Dec. 6.)

The employee moved for a ruling that the report was inadequate and sought to introduce additional medical evidence.[1.] (Dec. 6-7.) The judge denied the motion (Dec. 7) but, at hearing, marked and admitted into evidence a § 11A medical report dated November 4, 1993, prepared for a prior proceeding. (Tr. 8.) This 1993 report was never listed nor referred to in any way in the decision. The judge adopted the contemporaneous 1994 opinion of the § 11A examiner. (Dec. 6-7.)

Of relevance to this appeal are the following findings. The accepted cumulative trauma injury was found to have exacerbated the employee's preexisting reflex sympathetic dystrophy. (Dec. 8.) Although the insurer had paid for a power wheelchair, the employee's replacement of her Toyota with the specially equipped van was ruled a routine expense not causally related to the employee's industrial injury. The judge found that the employee's need for such a specially modified vehicle was "predominantly caused" by her preexisting reflex sympathetic dystrophy. (Dec. 8.) Paradoxically, the installation of hand controls was found to be a causally related, reasonable and necessary § 30 medical expense. (Dec. 8.) Therefore, of the vehicle-related claim items, only payment for the cost of those controls was awarded.[2.] (Dec. 11.) We have the employee's appeal from this decision.

The question of whether specially equipped private transportation for handicapped individuals with compensable industrial injuries is covered under the Act has yet to be addressed in the Commonwealth. The effort to dispose of this novel issue at hearing resulted in two legal errors.

"Proper decisions. ..must contain conclusions which are adequately supported by subsidiary findings which are not 'tainted by error of law.' " *Ballard's Case,* 13 Mass. App. Ct. 1068, 1069 (1982) [quoing *Paltsios's Case,* 329 Mass. 526, 528 (1952)]. As a basis for denying most of the claimed van modification expenses, the judge found "that her need for such a vehicle is, *more* likely than not, *predominantly* caused by her preexisting reflex sympathetic dystrophy." (Dec. 8.) (Emphasis added.)

The causal standard relied on by the judge appears nowhere in the Act. The closest approximation relates to mental, not physical, work injuries and appears in the 1991 version of § 1(7 A). The employee's case was accepted. There is no reason whatsoever to refer back to whether there was a compensable work injury when deciding the § 30 medical services issue. See *Cirignano v. Globe Nickel Plating,* 11 Mass. Workers'

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1. General Laws c. 152, § 11A, gives an impartial medical examiner's report the effect of "prima facie evidence with regard to the medical issues contained therein," and expressly prohibits the introduction of other medical evidence unless the judge finds the additional medical testimony is required due to the complexity of the medical issues involved or the inadequacy of the report.

2. There were other expenses claimed as part of this § 30 case. However, the employee does not contest their disposition, so we do not address them.

Comp. Rep. 17 (1997). Instead the causal relationship inquiry simply turns on whether the accepted work injury is an any way related to the need for the mechanical appliance sought.

A prior administrative judge ordered that the power wheelchair was a compensable expense under § 30. The determination was not appealed. That legally settled fact limits the subsequent causation inquiry. See *Franco* v. *Winston Restaurant.* 10 Mass. Workers' Comp. Rep. 645 (1996) (for discussion of *res judicata* effect of unappealed findings). To the extent that the employee continued to experience work-related pain and restrictions in her upper extremities, preventing her use of a manual wheelchair, her use of the power wheelchair continued to be causally related to her compensable injury. (Dec. 5-6.) *See note 1, supra.*

The judge's use of the wrong causation standard makes both the findings and the conclusion reached legally untenable. Thus, the causation finding is reversed. See G.L. c. 152, § 11C.

Next, the van fitted with a wheelchair lift and special driving equipment was erroneously evaluated as a garden variety "reasonable and necessary" medical expense claim. In determining whether modified private transportation is compensable the adjudicator must apply the language of the fourth paragraph of § 30. It reads in pertinent part:

> In any case where an administrative judge, the reviewing board, the office of education and vocational rehabilitation or the health care services board is of the opinion that the fitting of an employee eligible for compensation with an artificial eye or limb, *or other mechanical appliance, will promote his restoration to* or *continue him in industry;* it may be ordered that such employee be provided with such item, at the expense of the insurer.

(Emphasis added.) This particular aspect of § 30, by virtue of the plain meaning of the language used, includes consideration of practical vocational questions such as the employee's access to reliable transportation, where she lives and where her retraining and employment prospects are located, in order to reach whether the contested transportation will have a positive effect on "an injured employee's ability to hold a job or obtain a new position." *Scheff1er's Case,* 419 Mass. 251,256 (1994). The quoted language from § 30, *supra,* explicitly directs this assessment.

Finding no Massachusetts law governing whether a motor vehicle as a form of private transportation can be considered an "other mechanical appliance" under § 30, we look to other jurisdictions for guidance. There we find no uniformity of either statutory language or interpretation. We are persuaded, however, that the language of our Act is closer to those statutes in jurisdictions where courts have allowed coverage of specially equipped motor vehicles within their medical benefits sections.

In North Dakota, the Supreme Court held that the added expense associated with buying a handicap-adapted van beyond that of a regular automobile was a compensable benefit within the meaning of that state's statute. *Meyer v. North Dakota Workers' Compensation Bureau,* 512 N.W.2d 680, 684 (N.D. 1994). The pertinent section provides for medical and rehabilitation services, which include "furnish[ing] such artificial members and replacements as in the judgment of the bureau may be necessary to rehabilitate [the] injured employee."

N.D.C.C. § 65-05-07. " Artificial replacements" are defined as "mechanical aids including braces, belts, casts, or crutches as may be reasonable and necessary due to compensable injury." N.D.C.C. § 65-01-02 (2). *Meyer, supra.* As here, the hearing judge in *Meyer* had determined that only some of the claimed expenses were compensable. The court reasoned:

> The hearing officer found the van's adaptive equipment was reasonably necessary for [the paraplegic employee's] rehabilitation. The adaptive equipment is an "artificial replacement" under the statute. The hearing officer, however, incorrectly computed the cost associated with using the equipment. If as a part of his rehabilitation and return to employment, [the employee] must use adaptive equipment, *and if the adaptive equipment can only be used with a van, then the bureau is responsible for the cost of the adaptive equipment and the necessary additional vehicle cost associated with purchasing* a *van.*

Meyer, supra (emphasis added). Our Act provides that compensation be paid for "an artificial eye or limb, or other mechanical appliance [as] will promote [the employee's] restoration to or continue him in industry." G.L. c. 152, § 30. When we compare the language of the *Meyer* statutes-"artificial replacements," "mechanical aids," with our own "mechanical appliance" — coupled with the plainly stated intent of both statutes to promote rehabilitation of the handicapped employee, we see no reason to reach a different conclusion from that was reached in *Myer, supra.*

Similarly, the Court of Appeals in Arizona found that a specially equipped van was compensable as an "other apparatus" within the meaning of that state's medical benefits section. *Terry Grantham Co. v. Industrial Commission of Arizona,* 152 Ariz. 180, 741 P.2d 313, 316 (Ariz. App. 1987) ("modified van was essential to restore virtually any mobility"). Other states that have held the same in analogous fact situations include: *Fidelity and Casualty Co. v. Cooper,* 382 So.2d 1331, 1332 (Fla. App. 1980) ("[w]here an industrial injury necessitates the modification *or substitution* of an automobile in order to accommodate a wheelchair or artificial member and to restore in part a claimant's ambulatory ability, such costs may be awarded as 'other apparatus' ") (emphasis in original; *Manpower Temporary Services v. Sioson,* 529 N.W.2d 259, 264 (Iowa 1995) (defining "appliance" within medical benefits section, as a "means to an end," court stated, "[t]he 'end' of the van is merely an extension of [the employee's] 300-pound wheelchair" which the commissioner could reasonably view as a necessary appliance within the employee's medical care); *Crouch v. West Virginia Workers' Compensation*

between cost of handicapped equipped van and the cost of average, mid-priced automobile, of same year). Our Act's provision for .."mechanical appliance" expenses likewise should cover the cost of providing a specially equipped van.

We do not find those jurisdictions that have disallowed the cost of specially equipped motor vehicles within medical benefits sections persuasive. In New York, the Appellate Division rejected, with no supporting reasoning, a claim for the cost of a specially equipped van as a medical "apparatus." *Kranis v. Trunz, Inc.*, 91 A.D.2d 765 (1982). In North Carolina, the Court of Appeals held that a specially equipped van was not within the meaning of the statutory language, "other treatment or care or rehabilitative services," stating that the language applied only to medical services. *McDonald v. Brunswick Electric Membership Corp.*, 336 S.E.2d 407, 408 (N.C. App. 1985). General Laws c. 152, § 30, specifically directs attention beyond the strictly medical realm to the vocational realm by allowing compensability for "the fitting of an employee. ..with an artificial eye or limb, or other mechanical appliance" to be determined by "an administrative judge, the reviewing board, the office of education and vocational rehabilitation or the health care services board. ..." The Massachusetts statute appears to be unique in this respect. We are satisfied that interpretation of our statute more closely aligns with those jurisdictions that have covered expenses such as those at issue here than with those that have not.[3.]

Certainly, once causation is resolved the next question is what is economically necessary to transport the motorized wheelchair. See *Brigham* & *Willington v. Mapes*, 610 So.2d 623 (Fla. Dist. Ct. App. 1992); *Kraft Dairy Group v. Cohen*, 645 So.2d 1072, 1078 (Fla. Dist. Ct. App. 1994) (furnishing of van services found to be "the most economical means available"). Thus, cost differences ought to be taken into account. See *Crouch v. West Virginia Workers' Compensation Com'r., supra* (difference between cost of mid-priced automobile of same year and converted van); *Meyer v. North Dakota's Workers' Comp. Bureau*, 512 N.W.2d 680, 684 (1994); *Strickland v. Bowater, Inc.*, 472 S.E.2d 635 (1996). Moreover, the insurer would not be responsible for the vehicle's general maintenance or other ownership expenses. See *Manpower Temporary Servs. v. Siosin*, 529 N.W. 259, 264 (1995) (insurer not required to pay expenses of van's repair, fuel, title, license and insurance). We leave these and other particulars for the parties to prepare and present on recommittal.

Accordingly, we reverse the finding of no causal relationship as it is based on the wrong causation standard and recommit for application of the correct standard. Since the § 11A doctor has indicated that he is incapable of rendering an opinion on the medical causation question at issue, the administrative judge must require additional medical evidence on recommittal. (Statutory Exhibit 1.3.) See G.L. c. 152, § 11A(2); *O'Brien's Case*, 424 Mass. 16, 22-23 (1997) ("[i]n any case where these procedures still failed to offer a party an opportunity to present testimony necessary to present fairly the medical issues, then there might well be a failure of due

3. A Pennsylvania case argued by the insurer as supporting its exclusion of the van from § 30 coverage actually says nothing of the sort, and is inapposite. See *Rieger v. Workmen's Compensatjon App. Board*, 521 A.2d 84, 87 (Pa. Cmwlth.1987) (court reversed hearing judge's decision, and awarded expenses for installation of hand controls in employee's automobile as "orthopedic appliances").

process as applied in that case []"); *Mendez v. The Foxboro Co.*, 9 Mass. Workers' Comp. Rep. 641, 645 (1995) (a § 11A opinion that does not respond to contested medical issues is clearly inadequate and requires additional medical evidence); *Lebrun v. Century Markets*, 9 Mass. Workers' Comp. Rep. 692, 694-697 (1995).

Because we find our statute like those of some sister states will allow for transportation assistance up to and including a van, if continuing causation is established and under the fourth paragraph of § 30 the judge finds that a specially equipped van will promote the employee's restoration to or continue her in industry, he must order the insurer to provide it or some reasonable equivalent, for so long as such appliance is made necessary by the continuing effects of the work injury.

So ordered.

Judges McCarthy and Smith concur.

CASE #11 Proposition #6

Perry v. New England Business Service., 12 Mass. Workers' Comp. Rep. 88 (1998).

The administrative judge erred in rejecting the employee's claim for a motorized wheelchair without an expert opinion on whether it was reasonable and necessary. The judge further erred by failing to analyze whether a motorized wheelchair would have a positive effect on an injured employee's ability to get or hold a job under § 30.

BOARD NO.: 046901-92 March 13, 1998

JANICE PERRY vs. NEW ENGLAND BUSINESS SERV.
EMPLOYEE EMPLOYER

LIBERTY MUT. INS. CO.
INSURER

REVIEWING BOARD: Judges Maze-Rothstein, McCarthy, and Smith.

APPEARANCES: J. Channing Migner, Esq., for the employee.

Richard E. McCue, Esq., for the insurer

Michael J. Pineault, Esq., for th employer

MAZE-ROTHSTEIN, J.

The employee appeals from a decision denying her claim for G.L. c. 152, § 30 medical benefits. She had been awarded § 35 weekly partial incapacity benefits on her claim for either § 34A permanent and total or § 35 partial incapacity benefits, but her claim for medical benefits to cover psychiatric treatment and a motorized wheelchair was denied. We agree with the employee that the decision is lacking as to these matters. We reverse it in part and recommit the case for further proceedings.

On two occasions, first in May of 1992 and then on October 15,1992, Ms. Perry, who worked as a telemarketer, suffered an industrial injury when, while exiting the ladies' room, someone simultaneously entered causing the door to strike her left nondominant hand. (Dec. 2,4-5.) This latter incident caused such pain in her left thumb and forefinger she nearly fainted. (Dec. 5.) The insurer accepted liability for the October 1992 injury. (Dec. 2.) She has had two surgeries with releases for her left hand condition. (Dec. 6.) The employee suffers from life-long diabetes mellitus, heart disease and is an amputee. (Dec. 5-6, 9.) These medical conditions are unrelated to her industrial injury. Ms. Perry takes medications for pain and for a psychiatric condition and uses a prosthesis and occasionally a walker or a wheelchair to get around. (Dec. 6.) However, since her left hand surgeries, she finds it difficult to maneuver a manual wheelchair, which is the basis of her claim for a motorized one. I.

When her temporary total incapacity benefits were almost exhausted, the employee filed a claim for § 34A permanent and total or alternatively, § 35 partial incapacity benefits, along with a claim for § 30 medical benefits including a motorized wheelchair. (Dec. I.) [1] The insurer resisted. The claim went to a § 10A conference. (Dec. 2.) The judge ordered the insurer to pay § 35 weekly partial incapacity benefits and assigned a one hundred dollar weekly earning capacity. (Dec. I.) The employee appealed to a hearing *de novo.*

[1] See n. 3, infra

The employee underwent a medical examination pursuant to the provisions of G.L. c. 152, § llA. The physician opined that the employee's residual pain in her left hand was causally related to her industrial accident. (Dec. 8-9.) The doctor stated that, because of her pre-existing diabetes, her response to the release surgeries had not been good. In the doctor's opinion, the employee could not resume repetitive work with her left hand. (Dec. 9.) He also stated that, since the employee had come to her examination without her wheelchair, he could not comment on whether her left hand impairment made a motorized wheelchair necessary. (Dec. 9-10.) At his deposition, the doctor stated though he reviewed her psychiatric treatment records that he could not give an opinion on the employee's psychiatric condition, because he is not a psychiatrist and did not evaluate her for that. (Dep. 43-44.) After the deposition, the employee filed a motion to reopen the record for psychiatric evidence. (Dec. 12.)

The employee challenged the adequacy of the § llA report and deposition twice, once before and once after the deposition. [2.] (Dec. 12.) She argued that the § 11A physician's report and his deposition opinion were inadequate because in both the doctor failed to address the contested claim for a motorized wheelchair, and for psychiatric treatments. [3.] The judge denied the motions, declared the medical testimony adequate and adopted the doctor's opinions. (Dec. 9,12-13.) He denied the motion to reopen because the employee refused to fully disclose her psychiatric records to the insurer. (Dec. 12.) The judge concluded that the employee's left hand impairment continued to be causally related to the accepted industrial accident, and that the employee was partially incapacitated due to the residual effects of that occurrence and the subsequent surgeries. (Dec. 13.) Based on the residual impairment and her vocational profile, the judge awarded the employee § 35 benefits concluding that partial incapacity left her able to earn up to $7.50 per hour for a twenty-hour work week or one hundred fifty dollars weekly. (Dec. 14.) Because the employee testified that she could drive a car and use a standard wheelchair both at malls and while doing some work around her home, the judge ruled that a motorized wheelchair was neither necessary nor reasonable under § 30. (Dec. 13-14.) Reasoning that the employee's privacy interest in denying full disclosure of her psychiatric records was outweighed by the insurer's interest in having them to defend against the claim, the judge denied both her motions to introduce those records and to join her claim for

[2.] General Laws c. 152, § 11A gives an impartial medical examiner's report the effect of "prima facie evidence with regard to the medical issues contained therein," and expressly prohibits the introduction of other medical evidence to meet it unless the judge finds the additional medical testimony is required due to the complexity of the medical issues involved or the inadequacy of the report.

[3.] The claim for psychiatric treatments for depression was alleged as a sequelae of the work injury. It appears to have been first squarely presented to the judge in argument on the employee's second motion for additional medical evidence on July 30,1996 nearly a year before the decision was filed on April 29, 1997. (Tr. July 30,1996, 1-30.)

psychiatric treatment. [4.] (Dec.12.) The judge so ruled without an *in camera* review of the content of the psychiatric records. The employee appeals to the reviewing board.

The employee argues that the judge erred by rejecting her claim for a motorized wheelchair without an expert medical opinion on whether it was reasonable and necessary under § 30. We agree. The judge erred as a matter of law. On this record procedural due process required the allowance of additional medical evidence to address the question of whether the employee's left hand impairment disabled her from using a manual wheelchair. "[A] finding regarding the reasonableness of medical treatment must be based on expert medical testimony." Cook v. Somerset Nursing Home, 8 Mass. Workers' Comp. Rep. 164, 165 (1994). The § llA physician's statement that he could not comment on the necessity of a motorized wheelchair, because the employee was not using one when he examined her (Dep. 60), does not constitute an expert opinion as to whether such an apparatus would be medically reasonable and necessary under § 30. "The doctor's statement merely evidences a lack of opportunity, in this particular case" to assess the employee's need for a motorized wheelchair, at those times when she needed to use a wheelchair. See Lebrun v. Centurv Markets, 9 Mass. Workers' Comp. Rep. 692, 697 (1995). Because the § llA physician's testimony did not respond to the contest on the employee's occasional need for a wheelchair, the foreclosure of additional medical evidence deprived the employee of a fair opportunity to prove her case. The opinion was inadequate as a matter of law, and additional medical evidence is constitutionally mandated. See §11A(2); O'Brien's Case, 424 Mass. 16, 22-23 (1997); Mendez v. The Foxboro Company, 9 Mass. Workers' Comp. Rep. 641, 645 (1995)(a § 11A opinion that does not respond to contested medical issues is clearly inadequate and requires additional medical evidence). We therefore reverse the decision and recommit the case for the introduction of additional medical evidence, and further findings on the reasonableness and medical necessity of a motorized wheelchair .

We note another error in the treatment of the wheelchair issue. A claim for medical expenses for a wheelchair, is governed by a distinct provision in § 30, which reads:

> In any case where an administrative judge, the reviewing board, the office of education and vocational rehabilitation or the health care services board is of the opinion that the fitting of an employee eligible for compensation with an artificial eye or limb, *or other mechanical appliance, will promote his restoration to or continue him in industry,* it may be ordered that such employee be provided with such item, at the expense of the insurer .

(Emphasis added). As we stated in Stevens v. Northeastern Univ., 11 Mass. Workers' Comp. Rep. 167, 170 (1997):

> This particular aspect of § 30, by virtue of the plain meaning of the language used, includes consideration of practical vocational questions. .. in order to reach whether the contested wheelchair will have a positive effect on "an injured employee's ability to hold a job or obtain a new position." Scheffler's Case, 419 Mass. 251,256 (1994). The quoted language for § 30, *supra,* explicitly directs this assessment.

[4.] There were psychiatric reports from 1989 and 1995 submitted as offers of proof with the employee's motion for additional medical evidence, dated May 20,1996. See (July 30,1995 Tr. 25-26.)

On recommittal, the judge must apply and make findings on the relevant language of § 30.

The employee argues that the denial of her motion for the introduction of her psychiatric records was arbitrary, because the judge decided full disclosure of those records was required without having reviewed them *in camera.* [5.] This proposition is based on G.L. c. 233, § 20B, which sanctions the refusal of disclosing communications between a patient and her psychotherapist, except:

> (c) In any proceeding. ..in which the patient introduces his mental or emotional condition as an element of his claim or defense, and the judge or presiding officer finds that it is more important to the interests of justice that the communication be disclosed than that the relationship between patient and psychotherapist be protected.

The courts have advised that the practice when handling the claim of privilege under § 20B should include a *voir dire* of a testifying witness, Adoption of Seth, 29 Mass. App. Ct. 343, 353 (1990), or an *in camera* review of the records asserted to be privileged. See Commonwealth v. Bishop, 416 Mass. 169,174 (1993). In the present case, the judge should have reviewed the medical records before ruling that the balance of interests required full disclosure. Accord Lebrun, supra, at 694, n. 4("[I]t seems a reasoned judgment on such a motion [for additional medical evidence] would require that supporting documentation attached as an offer of proof should be reviewed.") If the psychiatric issue is joined, see n. 5, *supra,* the judge on recommittal shall reconsider his ruling on the privileged medical records after an *in camera* examination of those records.

Finally, the employee contends that a §13A(5) attorney's fee was due in this case, because the decision ordered medical benefits. Since this case is recommitted, the decision is not final. Whether the employee will prevail remains to be seen. On recommital the judge shall apply the relevant fee provisions. See G.L. c. 152, § 13A(5); 452 Code Mass. Regs. 1.19(4).

The case is recommitted for the introduction of additional medical evidence, and further proceedings consistent with this opinion.

So ordered.

Judges McCarthy and Smith concur.

[5.] While the better practice would have been to amend the claim by written motion prior to the hearing proceeding, the employee did so in the form of a Motion to Reopen. (Dec. 12.) The merits were argued. (Tr. July 30, 1996, 1-30.) The Motion to Reopen is mooted by the recommittal. The employee can move to join, or the case can proceed to the merits of the psychiatric sequelae of the physical work injury by consent. See 452 Code. Mass. Regs. 1.23; Debrosky v. Oxford Manor Nursing Home, II Mass. Workers' Comp. Rep. 243,245 (1997) .

J. APPELLATE COURT CASES

CASE #1

Doyle v. Department of Industrial Accidents, 50 Mass. App. Ct. 42 (2000).

There is no property right to vocational rehabilitation benefits which are awarded in the discretion of OEVR.

The Court leaves open the question of whether there is a property based entitlement requiring procedural due process protections where weekly benefits have been ordered or accepted and there is a 15% reduction in those benefits for non-participation in the VR process.

OEVR's current practice is to conduct an informal hearing with testimony and documents, if requested, where there is an appeal to the Commissioner pursuant to G.L c. 152, § 30H.

JOHN J. DOYLE *vs.* DEPARTMENT OF INDUSTRIAL ACCIDENTS & others.[1]

No.98-P-I647.

Norfolk. April 6, 2000. -September 7, 2000.

Present: PORADA, GILLERMAN, & LENK, JJ.

Practice, Civil, Relief in the nature of certiorari, Declaratory proceeding. *Declaratory Relief. Workers' Compensation Act,* Vocational rehabilitation benefits. *Due Process of Law,* Administrative hearing. *Statute.* Construction.

A claim in the nature of certiorari, seeking to challenge a determination of the Department of Industrial Accidents, that was not filed within the sixty-day statutory period was properly dismissed, and the procedural scheme for review satisfied the requirements of due process, in circumstances in which the plaintiff did not demonstrate a property interest in vocational rehabilitation benefits awarded at the discretion of the department. [44-47]

CIVIL ACTION commenced in the Superior Court Department on April 25, 1997.

A motion to dismiss was heard by *Nonnie* S. *Burnes,* J. The case was submitted on briefs.

William 7: *Salisbury* for the employee.

Jamie W. *Katz,* Assistant Attorney General, for Department of Industrial Accidents & another.

LENK, J. John J. Doyle claims on appeal that it was error for a Superior Court judge to have dismissed the complaint for declaratory and injunctive relief that Doyle brought against the Department of Industrial Accidents (DIA). Doyle's complaint arises from the fact that the DIA, despite initially having deemed Doyle suitable for vocational rehabilitation benefits and having so advised him, thereafter reversed its decision. Doyle maintains that the DIA' s procedures for adjudicating claims for vocational rehabilitation benefits deprive claimants, such as himself, of their right to due process of law.

[1] Commissioner of the Department of Industrial Accidents, the Attorney General, and August A. Busch & Company.

Doyle *v.* Department of Industrial Accidents.

The pertinent facts, drawn from the face of Doyle's complaint, are these. Doyle was employed by August A. Busch & Company (Busch) from 1982 until June, 1993. He was rendered totally and permanently disabled from his employment at Busch after suffering a number of work related back injuries.

On August 8, 1994, Teresa Rogg, a regional rehabilitation review officer from the DIA 's office of education and vocational rehabilitation (OEVR), deemed Doyle suitable for vocational rehabilitation benefits[2] Subsequently, Doyle met with Joseph Goodman, a rehabilitation counselor, for an initial vocational assessment. Goodman advised Rogg that a cost analysis should be performed and questioned whether Doyle would benefit from vocational rehabilitation services. On December 6, 1994, Rogg proposed that B'usch pay for the remainder of Doyle's undergraduate degree and gave Busch the required ten days to review this proposal.[3] Thereafter, Rogg granted Busch's request for an extension without specifying a new deadline.

On February 21, 1995, Busch obtained a research analysis indicating that there was no difference in the employability of an individual with either a Bachelor of Arts (BoA.) or a Bachelor of Science degree with a major in psychology for entry level positions. Rogg then reversed her initial suitability determina- tion and issued a new determination to the effect that Doyle was not a suitable candidate for vocational rehabilitation benefits based upon the study commissioned by Busch and the assumption that Doyle had sufficient credits to petition for a B.A. degree in psychology.[4] Doyle appealed this determination to the commissioner of the DIA pursuant to G. L. c. 152, § 30H. On July 9, 1996, the commissioner affirmed OEVR's determination without a hearing.

Doyle subsequently filed a complaint for declaratory and injunctive relief in the Superior Court which can be read as questioning the constitutionality of the DIA 's procedures for adjudicating claims regarding vocational rehabilitation benefits

[2] Doyle met with Rogg pursuant to G. L. c. 152, § 3OG, as inserted by St. 1985, c. 572, § 40, which states in pertinent part, "The office of education and vocational rehabilitation shall contact and meet with each injured employee who it believes may require vocational rehabilitation services in order to return to suitable employment."

[3]The estimated cost of this proposal was $5,000

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[4]Doyle maintains that the assumption that he had sufficient credits was mistaken.

pursuant to G. L. c. 152, § 30H. Doyle alleges violations of due process rights accorded him under the United States Constitution and the Massachusetts Declaration of Rights.

A Superior Court judge dismissed Doyle's claim for lack of subject matter jurisdiction insofar as the claim asserted was in the nature of certiorari, G. L. c. 249, § 4, but had not been filed within the sixty-day statutory time period. Doyle maintains this was error because the complaint challenges the constitutionality of the DIA's procedures, a question appropriate for declaratory relief.

For purposes of reviewing whether a complaint was properly dismissed, we accept as true the allegations of the complaint, draw all reasonable inferences in favor of the nonmoving party, and inquire whether it appears certain that the plaintiff was not entitled to relief under any facts which could be proven in support of his claim. See *Nader* v. *Citron,* 372 Mass. 96,98 (1977); *Fairneny* v. *Savogran Co.,* 422 Mass. 469,470 (1996).

Doyle does not dispute that, where an aggrieved party wishes to appeal a decision of an administrative agency, relief in the nature of certiorari pursuant to G. L. c. 249, § 4, is the appropriate remedy. See *McLellan* v. *Commissioner of Correction,* 29 Mass. App. Ct. 933,934 (1990). Accordingly, if we conclude that Doyle's complaint is in fact in the nature of certiorari, it follows that it was filed too late and was correctly dismissed. Doyle, however, contends that declaratory relief, rather than relief in the nature of certiorari, is the appropriate remedy because the claims he raises concern the constitutionality of the procedures used by the DIA when adjudicating claims regarding vocational rehabilitation benefits. "[A] complaint for declaratory relief is an appropriate way of testing the validity of regulations or the propriety of practices involving violations of rights, which are consistent and repeated in nature." *Nelson* v. *Commissioner of Correction,* 390 Mass. 379, 388 n.12 (1983). Hence, Doyle argues, his claim was improperly dismissed.[5]

[5] We note that, while the Superior Court judge concluded that Doyle's constitutional challenge was "fatally intermingled" with his untimely administrative decision challenge, she nonetheless addressed his constitutional claims. She concluded that Doyle lacked standing to seek declaratory relief for alleged due process violations because he had not alleged a legally cognizable injury. The judge also concluded that, even if Doyle had a property interest in vocational rehabilitation benefits, "it appears that the statutory scheme is sufficient to satisfy the requirements of due process."

Doyle v. Department of Industrial Accidents.

"To secure declaratory relief in a case involving administrative action, a plaintiff must show that (1) there is an actual controversy; (2) he has standing; (3) necessary parties have been joined; and (4) available administrative remedies have been exhausted." *Villages Dev. Co.* v. *Secretary of the Executive Office of Envtl. Affairs,* 410 Mass. 100, 106 (1991). In order to demonstrate standing, the plaintiff must allege a legally cogniz- able injury. See *Massachusetts Assn. of Indep. Ins. Agents* & *Brokers, Inc.* v. *Commissioner of Ins.,* 373 Mass. 290, 293 (1977); *Villages Dev. Co.* v. *Secretary of the Executive Office of Envtl. Affairs,* 410 Mass. at 106.

Doyle alleges that he was deprived of his right to vocational rehabilitation benefits without due process of law. "[W]here the plaintiffs claim that a denial of procedural due process deprived them of property, they must show first that the property interest that they claim was one to which they had an entitlement." *Liability Investigative Fund Effort, Inc.* v. *Massachusetts Med. Professional Ins. Assn.,* 418 Mass. 436, 443, cert. denied, 513 U.S. 1058 (1994). Thus, Doyle's claim rests upon whether he had an entitlement to vocational rehabilitation benefits pursuant to G. L. c. 152, § 30H.

Doyle raises his due process claims under both the Federal Constitution and art. 10 of the Massachusetts Declaration of Rights; the procedural protections under the two are co- extensive. See *School Comm. of Hatfield* v. *Board of Educ.,* 372 Mass. 513, 515 n.2 (1977); *Liability Investigative Fund Effort, Inc.* v. *Massachusetts Med. Professional Ins. Assn., supra* at 443. Property interests are not created by either the State or Federal Constitution; they are instead "created and their dimensions ...defined by existing rules or understandings that stem from an independent source such as state law." *Haverhill Manol; Inc.* v. *Commissioner of Pub. Welfare,* 368 Mass. 15, 23, cert. denied, 423 U.S. 929 (1975), quoting from *Regents of State Colleges* v. *Roth,* 408 U.S. 564, 577 (1972). See *Allen* v. *Assessors of Granby,* 387 Mass. 117,119 (1982); *Madera* v. *Secretary of the Executive Office of Communities* & *Dev.,* 418 Mass. 452, 459 (1994).

"To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Allen* v. *Assessors of Granby,* 387 Mass. at 120, quoting from *Regents of State Colleges* v. *Roth, supra* at 577. Generally, an individual has a property interest in a benefit when the relevant law establishes certain eligibility criteria which, if met, entitle an individual to the benefit. See *Madera* v. *Secretary of the Executive Office of Communities* & *Dev.,* 418 Mass. at 459. However, if the relevant law provides the awarding agency or other entity discretion to decide whether to grant benefits to a potential recipient, such discretion negates any entitlement claim which the potential recipient may have had. See *School Comm. of Hatfield* v. *Board of Educ.,* 372 Mass. at 516; *Allen* v. *Assessors ofGranby, supra* at 121; *Madera* v. *Secretary of the Executive Office of Communities* & *Dev., supra* at 459. Accordingly, Doyle's entitlement claim depends upon an analysis of G. L. c. 152, § 30H, to determine whether it provides the DIA discretion to grant or deny vocational rehabilitation benefits to potential recipients.

Doyle *v.* Department of Industrial Accidents.

Under G. L. c. 152, § 30H, as inserted by St. 1985, c.572, § 40, OEVR "shall determine if vocational rehabilitation is necessary and feasible to return the employee to suitable employment." Employment history, transferable skills, work habits, financial need, and a host of other factors are considered by OEVR to determine whether an individual qualifies for vocational rehabilitation benefits. See 452 Code Mass. Regs. § 4.05(2) (1993). The statute does not develop specific criteria which, if met, would entitle an individual to benefits, but instead provides OEVR with considerable discretion to determine whether to award such benefits. Potential recipients of vocational rehabilitation benefits accordingly do not have a property interest in those benefits rising to the level of an entitlement and are not afforded due process protection.

This is not the end of the inquiry, however, because Doyle argues that, even if an employee does not have a protected property interest in vocational rehabilitation benefits initially, the employee becomes entitled to due process protection after an initial determination is made that the employee is suitable for vocational rehabilitation benefits. Nonetheless, even if, under such circumstances, Doyle's expectation of vocational rehabilitation benefits were viewed as having risen to the level of a protected property interest, a point we need neither reach nor decide, the protection would only assure him of procedures sufficient to meet the requirements of due process. See *Mathews* v. *Eldridge*, 424 U.S. 319 (1976); *Bielawski* v. *Personnel Administrator of the Div. of Personnel Admn.*, 422 Mass. 459, 466 (1996). "The fundamental requisite of due process is an opportunity to be heard at a meaningful time and in a meaningful manner." *Matter of Kenney*, 399 Mass. 431,435 (1987).

Doyle contends that, in rendering an adverse suitability determination, Rogg was mistaken in assuming that he had sufficient credits to obtain a B.A. degree in psychology. Doyle asserts that, because he was not provided a hearing to correct OEVR' s mistaken information, he was denied due process. In this regard, however, the record suggests that, on July 20, 1995, after Rogg's adverse redetermination, Doyle submitted a letter to Rogg with an attachment from his undergraduate institution indicating that he had not satisfied the requirements for a B.A. degree. Rogg responded to this letter on July 25, 1995, indicating that the information included in Doyle's July 20, 1995, letter did not change her adverse suitability determination, which determination the commissioner then supported. Thus, although not afforded a hearing, Doyle, through the submission of

documentary evidence,availed himself of the opportunity to correct OEVR's alleged misunderstanding of his undergraduate degree status. It was open to Doyle to challenge the commissioner's determination by bringing an action in the nature of certiorari. Doyle did not pursue this review in a timely manner and, accordingly, did not take full advantage of the procedural scheme provided him.[6] That scheme requires action by a regional rehabilitation review officer (here, Rogg), provides for an appeal to the commissioner, and thereafter provides for limited judicial review. Such a procedural scheme satisfies the requirements of due process. See *Bielawski* v. *Personnel Administrator of the Div. of Personnel Admn.* , 422 Mass. at 466.

The complaint was correctly dismissed.

Judgment affirmed.

[6] Absent special circumstances (not present here), an action for declaratory relief cannot be used to avoid the time bar consequences of failure to pursue the appropriate form of judicial review or appeal. See *School Comm. of Franklin* v. *Commissioner of Educ.*, 395 Mass. 800, 807-808 (1985); *Bielawski* v. *Personnel Administrator of the Div. of Personnel Admn., supra* at 464 n.ll.

CASE #2

Canavan's Case, 48 Mass. App. Ct. 297 (1999)

This case discusses evidentiary and foundational issues in expert opinions as set out in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) and Commonwealth v. Lanigan, 419 Mass. 15, 26 (1994), which could have bearing on hypothetical labor market surveys offered into evidence at § 11B hearing on issues of earning capacity.

The recent United States Supreme Court case, Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999) held that the principles in Daubert and Merrell Dow apply not only to "scientific" testimony, but to all expert testimony (i.e. in this forum, the testimony of VR experts).

In Caldwell v. Fleet Financial Group, Inc., 15 Mass. Workers' Comp. Rep._____(May 9, 2001), the reviewing board ruled that labor market surveys are admissible into evidence as source material or foundation for the vocational expert's opinion, but in so far as they are hearsay, they are not admissible to prove the truth of the matters therein.

THERESA CANAVAN'S CASE.

No. 98-P-1253

. Suffolk. September 9, 1999. -December 1, 1999.

Present: ARMSTRONG, GILLERMAN, & PORADA, JJ.

Workers. Compensation Act, Expert opinion. Proximate cause. *Evidence.* Expert opinion, Competency. *Witness.* Expert. *Multiple Chemical Sensitivity.*

In a workers' compensation case, the findings of the administrative judge demonstrated that he applied the appropriate analysis, following *Commonwealth* v. *Lanigan,* 419 Mass. 15, 26 (1994), in admitting in evidence the employee's medical expert's opinion regarding the diagnosis of multiple chemical sensitivity [299-301], and the judge did not err in admitting that expert's testimony on causation of the employee's injury and in adopting it over conflicting evidence [301-302].

APPEAL from a decision of the Industrial Accident Reviewing board.

Matthew J. *Walko* for the employer.

Peter F. Brady, Jr., for the employee.

PORADA, J. The principal issue in this case is the admission in evidence of the opinions of the employee' s medical expert on diagnosis, disability, and causation. The self-insurer, Brigham and Women' s Hospital, claims that this evidence, under the test set forth in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993), and adopted by our Supreme Judicial Court in *Commonwealth* v. *Lanigan,* 419 Mass. 15, 26 (1994), should not have been admitted by an administrative judge (judge) in a workers' compensation hearing to determine the self-insurer's request to discontinue compensation and the employee' s request for payment of various medical expenses. Based on the testimony of the employee and her medical expert, the judge ordered the insurer to pay medical expenses incurred by the employee under G. L. c. 152, §§ 13 and 30, and denied the self-insurer's request to discontinue compensation. The judge's decision was summarily affirmed by the Department of Industrial Accidents Reviewing board (board), and the self- insurer filed this appeal.

The employee is a registered nurse. In September, 1983, she went to work as a staff nurse in the recovery room at Brigham and Women's Hospital (hospital). In July, 1990, she became an operating room nurse at the hospital. During her employment in the operating room, the employee was exposed to various chemicals such as ethylene oxide, formaldehyde, diesel fuel, and other chemicals used in cleaning solutions. On August 6, 1993, she worked a ten-hour shift in operating room sixteen. At the end of her shift on that day, she experienced a severe headache and nasal stuffiness. When she awoke the following morning, she had a fever, her nose was red, and her right cheek was swollen. She was seen by a physician at the hospital on August 9, 1993, who confirmed those conditions. The physician prescribed antibiotics. She was diagnosed as suffering from chronic sinusitis and was considered disabled. The self-insurer accepted her medical condition as work related and has been paying workers' compensation to date.

The employee was examined by Dr. LaCava in June, 1994. He is certified in pediatrics by the American Board of Medical Specialties and certified in environmental medicine by the American Board of Environmental Physicians, which is not recognized by the American Board of Medical Specialties. Dr. LaCava took a history from the employee, performed a physical examination, and conducted a number of diagnostic tests. In his opinion, the employee suffers from arthritis, paresthesias, organic brain syndrome, chemical induced headaches, immunodeficiency, and multiple chemical sensitivities secondary to chemical poisoning at the hospital. He defines multiple chemical sensitivity as a "systemic reaction of the body with multiple symptoms to multiple kinds of chemicals, which may be chemically unrelated, which are commonly present in the every day working and living environment where that environment has not been meticulously cleaned up and had the chemical sources removed." In Dr. LaCava's opinion, the employee's medical condition is directly caused by the multiple chemicals that she has been exposed to at the hospital during the course of her employment and renders her totally disabled. For the treatment of her medical condition, Dr. LaCava has prescribed intravenous infusions of multi-vitamins, in particular vitamin C, oral nutrient supplements, antibiotics, and heat and sauna therapy.

The employee was examined on two separate occasions by Dr. Acetta for the self-insurer. Dr. Acetta is board certified by the American Board of Medical Specialties in allergy and immunology. He diagnosed the employee as suffering from chronic nonallergic rhinitis caused by nonspecific stimuli in one's every day environment. Dr. Acetta is of the opinion that this condition is not related to her work at the hospital and is not physically disabling. He also opjnes that there is no medical evidence of chemical poisoning in this case and avers that multiple chemical sensitivities is "not accepted as a diagnostic disease by mainstream allergists/immunologists and occupational medicine physicians." Further, Dr. Acetta is of the opinion that the employee suffers from Munchausen syndrome, a psychological disorder which accounts for her many symptoms.

The self-insurer had objected to the admissibility of Dr. LaCava's opinions relating to diagnosis, disability, and causation during Dr. LaCava's deposition, specifying foundation as its ground, and, subsequently, had argued to the judge that those opinions should either be struck or excluded from evidence because they lacked the necessary reliability under the *Lanigan* standard. *Commonwealth* v. *Lanigan,* 419 Mass. at 26. The judge overruled those objections. Although the employee asserts that the issue of the admissibility of those opinions was not suf - ficiently preserved for review, we conclude that the steps taken by the self-insurer preserved the issue for review by us.

There is no question that the rules of evidence applicable to the courts of this Commonwealth governed the admissibility of Dr. LaCava's opinions relating to diagnosis, disability, and causation. 452 Code Mass. Regs. § 1.11(5) (1993). Under the *Daubert* test adopted by our Supreme Judicial Court in *Lanigan,* a party seeking to introduce scientific evidence in a court must lay a foundation either by showing that the underlying scientific theory is generally accepted within the relevant scientific community or by a showing that the theory is reliable or valid through other means. *Commonwealth* v. *Sands,* 424 Mass. 184, 185-186 (1997). Specifically, the self -insurer argues that the *Lanigan* analysis is applicable because there is no general acceptance in the medical community of the diagnosis of multiple chemical sensitivities as a clinical entity or of its causation. While the self-insurer's premise about multiple

chemical sensitivity may well be accurate,[1] general acceptance within the medical community is only one of the many factors under *Lanigan* that can be examined to determine whether the reasoning or methodology underlying the testimony is scientifi- cally valid and whether the reasoning or methodology properly can be applied to the facts in issue. *Higgins* v. *Delta Elevator Serv. Corp.,* 45 Mass. App. Ct. 643, 646 (1998). Among other factors that can be applied are whether the theory or technique is capable of being tested and whether the theory or technique has been published or subjected to peer review. *Commonwealth* v. *Lanigan,* 419 Mass. at 25.

Although the judge never explicitly referred to the *Lanigan* analysis, his findings indicate that he applied that analysis in his decision. Among those findings were his reference to the diagnostic tests which Dr. LaCava performed and described as generally accepted in the community of doctors who understand toxicity (not, for example, allergists such as Dr. Acetta), and the other laboratory tests which the judge found supportive of Dr. LaCava's diagnosis; and, in addition, his inclusion in his deci- sion of Dr. Acetta' s testimony that there were no peer review studies which support the diagnosis of multiple chemical sensitivity and that the disease was not accepted by mainstream

[1] In cases in which a claimant has sought to recover for personal injuries resulting from exposure ,to chemicals, the Federal courts have generally held that expert testimony on multiple chemical sensitivity fails to meet the standard of evidentiary reliability established in *Daubert.* See *Bradley* v. *Brown,* 852 F. Supp. 690, 700 (N.D. Ind.), aff'd, 42 F.3d 434 (7th Cir. 1994); *Summers* v. *Missouri Pac. R.R. Sys.,* 897 F. Supp. 533, 542 (E.D. Okla. 1995), aff'd in relevant part, 132 F.3d 599, 603-604 (lOth Cir. 1997); *Sanderson* v. *International Flavors* & *Fragrances. Inc.,* 950 F. Supp. 981, 1002 (C.D. Cal. 1996); *Coffin* v. *Orkin Exterminating Co.,* 20 F. Supp. 2d 107 (D. Me. 1998). But see *Kouril* v. *Bowen,* 912 F.2d 971,974 (8th Cir. 1990) (award of social security disability benefits upheld for multiple chemical sensitivity); *Kornock* v. *Har- ris,* 648 F.2d 525 (9th Cir. 1980) (same); *Creamer* v. *Callahan,* 981 F. Supp. 703,705 (D. Mass. 1997) (on appeal, commissioner stipulated that the Social Security Administration "recognize[d] multiple chemical sensitivity as a medically determinable impairment"); and *Robinson* v. *SAIF Corp.,* 78 Or. App. 581 (1986), and *Appeal of Kehoe,* 139 N.H. 24 (1994), in which both the Oregon and New Hampshire courts recognized that workers' compensation benefits could properly be awarded for work related multiple chemical sensitivities. See also Galbato, Multiple Chemical Sensitivity: Does Daubert v. Merrell Dow Pharmaceuticals, Inc. Warrant Another Look at Clinical Ecology?, 48 Syracuse L. Rev. 261, 286-294 (1998); Magi1l & Suruda, Multiple Chemical Sensitivity Syndrome, 58 Am. Fam. Physician 721 (September 1,1998).

allergists/immunologists and occupational medical physicians. Further, the judge could properly take into consideration Dr. LaCava' s knowledge, training and clinical experience, his review of the employee's history and medical records, his physical examination of the employee, and the diagnostic and laboratory tests performed by him on the employee in determining whether Dr. LaCava' s opinions were admissible under a *Lanigan* analysis. Compare *Adoption of Hugo,* 428 Mass. 219, 234 (1998), cert. denied sub nom. *Hugo P.* v. *George P.*, 119 S. Ct. 1286 (1999).

In any event, it is generally understood that certain expert testimony based on personal observations, clinical experience, or generally accepted scientific techniques need not be subject to the *Lanigan* analysis. *Vassallo* v. *Baxter Healthcare Corp.*, 428 Mass. 1, 15 & n.15 (1998). It is well established that a treating physician may testify to a patient's "ailments, bodily condition. and extent to which a person was affected [by them]." *Kramer* v, *John Hancock Mut. Life Ins. Co.*, 336 Mass. 465, 467 (1957), In this case, the employee had introduced evidence that Dr. LaCava was one of her treating physicians and as such he had familiarized himself with her medical and work history, performed a physical examination of her, and had conducted a number of diagnostic tests. Based on evidence of Dr. LaCava's personal observations, his clinical experience, and the methodology pursued by him, the employee had laid a sufficient foundation for the admission of his expert opinion testimony regarding her diagnosis and disability. What weight was to be given to those opinions remained for the fact finder. *Commonwealth* v. *Lanigan.* ..419 Mass, at 26. Consequently, whether we apply the more rigorous *Lanigan* analysis or the principles just stated, the judge did not err in admitting the medical expert's opinions on diagnosis or disability.

The more troubling issue in this case is the admissibility of Dr. LaCava.s opinion on causation. While Dr. LaCava did testify to a reasonable degree of medical certainty that the employee's diagnosis of multiple chemical sensitivity was caused by her exposure to organic compounds at the hospital, he admitted that the cause of the disease is in dispute, However, he qualified this opinion by stating that the factors which cause the disease are known, but the weight to be given to those factors varies in each individual case. He asserted nevertheless, that in the case of this employee, there can be no doubt that the controlling factor is her exposure to organic chemicals in her workplace because he has other patients who are similarly affiicted who worked in the same pod at the hospital the self-insurer argues that this opinion should be rejected not only because it is unreliable and speculative but also because the expert did not know the nature, amount, and duration of exposure of the chemicals to which the employee was exposed.

In any claim for workers' compensation, the employee has the burden of proving a causal relationship, but the employee is "not required to exclude all other possible sources of [her] injury." *Rodrigues's Case,* 296 Mass. 192, 195 (1936). "It is sufficient if the evidence afforded the basis for the reasonable inference that [the employee's] injury resulted from [her] work." *Ibid.* See *O'Donnell's Case,* 237 Mass. 164, 166 (1921). As the question of medical causation is "beyond the. .. knowledge of the ordinary layman, ...proof of it must rest upon expert medical testimony." *Hachadourian's Case,* 340 Mass. 81, 85 (1959). Here, the employee's medical expert was well aware and informed about the nature of the chemicals to which the employee had been exposed during her tenure of employment. Based upon that knowledge and the diagnostic tests that he performed, he could reasonably infer that her condition was caused by her exposure to chemicals in the workplace. See *O'Donnell's Case, supra* at 165-166; *Wax's Case,* 357 Mass. 599, 600-602 (1970). The amount and duration of that exposure need not have been proved. See *Duggan's Case,* 315 Mass. 355, 357-359 (1944); *Watson's Case,* 322 Mass. 581, 583-584 (1948); *Brek's Case,* 335 Mass. 144, 146-148 (1956); *Casey's Case,* 6 Mass. App. Ct. 859, 859 (1978). Further, the judge could properly take into account that Dr. LaCava's opinion was buttressed by his knowledge that other patients of his who had been similarly employed in the same pod at the hospital were similarly afflicted. See *Brek's Case,* 335 Mass. at 149 (physician permitted to testify that other patients had been victims of asbestos from the same plant). In those circumstances, the judge did not err in admitting Dr. LaCava's opinion on causation and adopting it over that of the conflicting testimony of Dr. Acetta. *Adams's Case,* 339 Mass. 772,772 (1959). The self-insurer also argues that the employee has failed to prove that the intravenous infusions of vitamin C, antibiotic regimen, oral nutrients, and physical therapy prescribed by Dr. LaCava were reasonable and necessary. Based upon the testimony of the employee and Dr. LaCava and the medical report of Dr. LaCava in evidence, which the judge credited, there was adequate evidentiary support for the judge to have concluded that the medical expenses incurred by the employee were reasonable and necessary for the treatment of her work related medical condition. See *Scheffler's Case,* 419 Mass. 251, 258 (1994). The decision of the board is affirmed.

So ordered.

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VII. APPENDICES

TABLE OF CONTENTS

***** Detailed Table of Contents for each section, at 144, 149, 176.

1. REVISED INFORMATIONAL HANDOUTS

TABLE OF CONTENTS

I. INFORMATIONAL MEETING HANDOUT (Revised)

Information About Your
Eligibility for Vocational Rehabilitation Services

Vocational Rehabilitation (VR) services are meant to help people who have been injured in Massachusetts. The goals of Vocational Rehabilitation are to (1) help you return to suitable employment that is within your physical and mental capabilities and limitations, and (2) help you obtain employment consistent with your wages at the time of your injury even if you are not presently receiving weekly benefits. Vocational Rehabilitation is a process that helps you replace your wages, not to enhance them.

As was discussed in your meeting, you are not eligible for Vocational Rehabilitation services at this time because **liability has neither been established nor accepted.** The Workers' Compensation Law does, however, allow the insurance company to pay you workers' compensation for your lost wages and may even pay for your medical bills related to your injury without having to accept liability for future problems. This may be for a period of up to 180 days and may even be extended an additional 180 days, but only with your consent. The insurance company may agree to provide VR services by agreement with you at any time during the "pay without prejudice period."

In the event you learn after our first meeting that liability has been accepted or established by a judge, you may feel free to call me for an appointment to discuss the application process for VR. At our next meeting, you will need to bring copies of medical reports that state you are medically stable and some indication of what your physical limitations are from your doctor.

II. MANDATORY MEETING HANDOUT

MANDATORY MEETING HANDOUT
(REVISED)

VOCATIONAL REHABILITATION--DON'T SETTLE FOR LESS

By far, the majority of workers injured are able to return to some type of employment. There are, however, those injuries that result in a functional limitation to employment, and where the injured worker has been told by his/her doctor that he/she cannot return to his/her usual line of work or career.

If you find yourself in this situation, you are, no doubt, worried about how you will be able to make a living to support yourself and your family. That is what vocational rehabilitation is all about. It is designed for workers who have functional limitations as a result of their injuries and its purpose is to assist them in finding a new job or career that their injuries will not prevent them from doing.

The following questions and answers will help to explain the nature and scope of Vocational Rehabilitation Services so that you can start planning now for the future while you are still receiving Workers' Compensation.

l. What is vocational rehabilitation?

Vocational Rehabilitation services are non-medical services that will assist an individual who has functional limitations to return to gainful employment.

2. Who may apply for vocational rehabilitation services?

Any employee who has a medical disability that results in a functional limitation to previous employment or who has functional limitations which will be permanent or last for an indefinite period of time. You may be eligible if liability is established. You may be eligible even if you are not receiving weekly benefits, or if your employer was not insured.

3. Who determines if I am eligible for vocational rehabilitation services?

The Office of Education and Vocational Rehabilitation will evaluate you to determine if you are eligible for vocational rehabilitation services by reviewing your medical, educational, vocational and employment history to assist you in the determination of eligibility for vocational rehabilitation services. If you are found to be eligible, OEVR will contact the insurer and request they arrange vocational rehabilitation services for you.

4. If I am found eligible for vocational rehabilitation services will the insurer provide me with such services?

The insurer may refuse to provide you with VR services even if you have been found eligible. In this case, the Department may determine to arrange services for you, utilizing funds from the DIA Trust Fund (subject to approval from the Director of OEVR and availability of such funds).

5. Does vocational rehabilitation mean I will be sent to school and retrained?

Not Necessarily. The vocational rehabilitation process is employment oriented and is designed to get you back to employment in the most expedient and cost-effective way. Therefore, attempts will be made to return you to your same employer, your same job.

-If that is not successful, then an effort will be made to modify your job so you can return to your same prior employer.
-If that is not successful, then an effort will be made to find a different job with your employer.
-If that is not successful, then an effort will be made to find a different job with a different employer
-If that is not successful, then retraining **may** be considered and undertaken.

6. The insurer is providing me with extra money as part of my settlement for me to take care of my own vocational rehabilitation. Can the insurer do this?

No. The cost of vocational rehabilitation services (vocational counseling and testing, job seeking skills, job placement, job modification, etc.) cannot be made part of your lump sum settlement. As the workers' compensation statute clearly states, if at anytime you decide to settle your case "said agreement [to settle] shall not redeem liability for the payment of medical benefits or vocational benefits with respect to [your] injury." G.L. c.152, § 48(2). Moreover, "[n]o lump sum settlement shall be reached between an insurer and any employee who has been deemed suitable for vocational rehabilitation services by the office of education and vocational rehabilitation who has not completed an appropriate rehabilitation program **. . . ,** without the expressed written consent of said office." G.L. c. 152, §§ 30G, 48(3). "Any employee who receives an amount in violation of [§ 48(3), i.e. without OEVR consent], shall have the right to re-open his or her claim for compensation." Id.

7. If I do settle my case prior to my vocational rehabilitation eligibility determination, does this end my right to seek vocational services through OEVR?

No. If your date of injury is after 1991, you may seek vocational rehabilitation within two (2) years of approval of your lump sum settlement. See G.L. c. 152, § 48 (2).

8. Do I have to accept vocational rehabilitation services?

No. However, if you are found eligible for vocational rehabilitation services by this department and you do not participate in a vocational rehabilitation program, your weekly compensation may be reduced by 15%.

9. Will I be guaranteed a job?

No. No one can offer any guarantees. The Regional Rehabilitation Review Officer assigned to your case will oversee progress in your active return to work efforts.

10. What if I need a mechanical appliance?

The RRO determines whether an employee requires a mechanical device/appliance/artificial eye or limb to restore or continue him/her in industry. G.L. c. 152, § 30 (par.4). See Determination Form, at 172.

2. OEVR FORMS (SOME REVISED)
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I. FORM 440 (REVISED)

Commonwealth of Massachusetts
Department of Industrial Accidents
Office of Education & Vocational Rehabilitation – (OEVR)
600 Washington Street
Boston, MA 02111

INJURY DATE: **FORM 440**
BOARD NUMBER: DATED:

NAME OF EMPLOYEE
ADDRESS

Dear Employee:

Pursuant to the Massachusetts workers' compensation law, c. 152, § 30G, this is to inform you that, regardless of whether your employer was insured, you may be eligible for vocational rehabilitation services if you meet the following criteria:

A. Liability for your case has been established.
B. There is medical documentation showing substantial restrictions from performance of your former employment.
C. You have reached or nearly reached a medical end result or maximum medical improvement.
D. If it appears (as determined by OEVR) that vocational rehabilitation would be feasible in returning you to your former weekly wage.

If you believe you may meet the criteria above, please forward the bottom portion of this letter to the Department of Industrial Accidents, Office of Education and Vocational Rehabilitation, 600 Washington Street, Boston, MA 02111. Shortly thereafter, a representative from this office will contact you. Please assure that your address, date of birth and phone number are correct. Please also note your Pre-injury occupation and the type of work injury you sustained.

Additionally, if liability has been established and at any time you should decide to lump sum settle your case "said agreement [to settle] shall not redeem liability for the payment of medical benefits or vocational benefits with respect to [your] injury" G.L. c.152, § 48(2). Moreover "[n]o lump sum shall be reached between an insurer and any employee who has been deemed suitable for vocational rehabilitation services by the office of education and vocational rehabilitation who

has not completed an appropriate rehabilitation program . . . without the express written consent of said office." G.L. c. 152, §§ 30G, 48(3). "Any employee who receives an amount in violation of [§ 48(3), i.e. without OEVR consent], shall have the right to re-open his or her claim for compensation." Id.

OEVR, within the Department of Industrial Accidents, will then arrange an interview, if necessary, and will otherwise inform you of options for services. If you are found suitable for vocational rehabilitation services by the office, the insurer will be requested to provide such services and OEVR will assist in developing a specific plan for your return to work. If as a result of your meeting with OEVR, you are deemed not suitable for vocational services, you may seek another suitability determination any time your condition improves.
If you have already returned to work, please disregard this notice.
==========
I am interested in exploring vocational services; please contact me.

Employee:

Address:

Board #: Date of Injury:

Pre-injury occupation: Date of birth:

Type of injury:

Phone: Date of notice:

Employer:

Insurer: Form: 440

Please return to the Department of Industrial Accidents, Office of Education And Vocational Rehabilitation (OEVR): 600 Washington Street, Boston, MA 02111

II. **OEVR INTERNAL REFERRAL FORM**

DEPARTMENT OF INDUSTRIAL ACCIDENTS
OFFICE OF EDUCATION AND VOCATIONAL REHABILITATION REFERRAL
(Internal referral only)

CLAIMANT'S NAME:_____

ADDRESS:_____

PHONE NUMBER:_____

DIA BOARD NUMBER:_____

INJURY:_____

DATE OF INJURY:_____

CLAIMANT'S ATTORNEY:_____

ADDRESS:_____

PHONE NUMBER:_____

INSURANCE CARRIER:_____

ADDRESS:_____

CLAIMS REPRESENTATIVE:_____

PHONE NUMBER:_____

REHAB REVIEW OFFICER:_____

COMMENTS:_____

_____

_____

_____ _____
JUDGE DATE

III. OEVR REFERRAL FORM FOR ALL PARTIES FOR MANDATORY MEETINGS

MASSACHUSETTS DEPARTMENT OF INDUSTRIAL ACCIDENTS
OFFICE OF EDUCATION AND VOCATIONAL REHABILITATION

REFERRAL FOR MANDATORY MEETINGS HELD UNDER G.L.c.152,§ 30G
Please attach all pertinent medical and rehabilitation information

CLAIMANT'S NAME _____

ADDRESS _____ / _____ / _____ / ___
Street City State Zip

PHONE NUMBER _____ _____

SOCIAL SECURITY NUMBER _____

DATE OF INJURY _____

INSURER NAME _____

INSURER'S CLAIM NUMBER _____

ADDRESS _____ / _____ / _____ / ___
Street City state Zip

PHONE NUMBER _____ _____

APPROVED VOC REHAB PROVIDER _____

REHABILITATION SPECIALIST _____

ADDRESS _____ / _____ / _____/_
Street City State Zip

PHONE NUMBER _____ _____

CLAIMANT'S ATTORNEY _____

ATTORNEY'S FIRM _____

ADDRESS _____ / _____ / _____ / ___
Street City State Zip

PHONE NUMBER _____ _____

HAS LIABILITY BEEN ESTABLISHED? Yes[] No[] REFERRAL DATE /_/_/_

HAVE ANY VOC REHAB SERVICES BEEN PROVIDED? Yes [] No []

IF YES, DESCRIBE NATURE AND DATE(S) OF SERVICE(S)

_____ _____ _____
INSURANCE OR PROVIDER REPRESENTATIVE/TITLE DATE

IV. MANDATORY MEETINGS APPOINTMENT LETTER (REVISED)

Date:

Employee Name
Employee Address

NOTICE OF MANDATORY MEETING

Dear:

The Office of Education and Vocational Rehabilitation (OEVR) at the Department of Industrial Accidents has been notified of your recent work-related injury.

Pursuant to M.G.L. c. 152, § 30G, you are required to meet with a representative of OEVR as part of the workers' compensation process.

The purpose of the meeting is to provide you with information and to determine your suitability for vocational rehabilitation benefits, as mandated by M.G.L. c.152, § 30H, and if necessary, to determine whether or not you are eligible for compensation with a mechanical appliance.

The vocational rehabilitation program consists of reasonably necessary vocational and non-medical services designed to assist you in returning to suitable employment at a wage that is as close as possible to pre-injury earnings in accordance with the following hierarchy:

1. re-employment in your pre-injury job;

2. re-employment in your pre-injury job with modifications;

3. re-employment in a different job with the pre-injury employer;

4. re-employment in a job with a different employer;

5. re-training;

6. necessary mechanical device(s).

In order to facilitate an appropriate determination as to your suitability for such services, you are required to bring to the meeting any and all pertinent information relating to your injury, INCLUDING RELEVANT MEDICAL INFORMATION, as noted on the attached VR Information Checklist Form.

NOTE TO ALL INTERESTED PARTIES: Any and all medical documentation relevant to the employees determination of suitability must be submitted on or before the scheduled mandatory meeting as noted below. If said documentation is not received in advance of this mandatory meeting, the determination of suitability shall be made *only* on the basis of the information received by the scheduled meeting date. Insurer's counsel and insurance representatives shall *NOT* attend the Mandatory Meeting.

Your meeting has been scheduled for:

DATE:

TIME:

PLACE:

In accordance with M.G.L. c. 152, § 30G, "Any such employee who refuses to meet with the office of education and vocational rehabilitation shall not be entitled to weekly compensation benefits during the period of such refusal."

If you have any questions or concerns regarding this notice, please do not hesitate to contact this office.

We look forward to meeting with you.

Sincerely,

Regional Rehabilitation
Review Officer
(617) 727-4900 x

cc: <Employee's Counsel>
<Claims Adjuster>

Date

CERTIFIED MAIL
Employee Name
Employee Address

V. SECOND NOTICE OF MANDATORY MEETING (REVISED)

Dear:

The Office of Education and Vocational Rehabilitation (OEVR) at the Department of Industrial Accidents has been notified of your recent work-related injury.

Pursuant to M.G.L. c. 152, § 30G, you are required to meet with a representative of OEVR as part of the workers' compensation process.

The purpose of the meeting is to provide you with information and to determine your suitability for vocational rehabilitation benefits, as mandated by M.G.L. c.152, § 30H, and if necessary, to determine whether or not you are eligible for compensation with a mechanical appliance.

The vocational rehabilitation program consists of reasonably necessary vocational and non-medical services designed to assist you in returning to suitable employment at a wage that is as close as possible to pre-injury earnings in accordance with the following hierarchy:

1. re-employment in your pre-injury job;

2. re-employment in your pre-injury job with modifications;

3. re-employment in a different job with the pre-injury employer;

4. re-employment in a job with a different employer;

5. re-training;

6. necessary mechanical device(s).

In order to facilitate an appropriate determination as to your suitability for such services, you are required to bring to the meeting any and all pertinent information relating to your injury, <u>INCLUDING RELEVANT</u> <u>MEDICAL INFORMATION</u>, as noted on the attached VR Information Checklist Form.

<u>NOTE TO ALL INTERESTED PARTIES</u>: Any and all medical documentation relevant to the employees determination of suitability must be submitted on or before the scheduled mandatory meeting as noted below. If said documentation is not received in advance of this mandatory meeting, the determination of suitability shall be made <u>*only*</u> on the basis of the information received by the scheduled meeting date. Insurer's counsel and insurance representatives shall <u>*NOT*</u> attend the Mandatory Meeting.

Your meeting has been scheduled for:

DATE:

TIME:

PLACE:

In accordance with M.G.L. c. 152, § 30G, "Any such employee who refuses to meet with the office of education and vocational rehabilitation shall not be entitled to weekly compensation benefits during the period of such refusal."

If you have any questions or concerns regarding this notice, please do not hesitate to contact this office.

We look forward to meeting with you.

Sincerely,

Regional Rehabilitation
Review Officer
Telephone #:727-4900 x

cc: <Employee's Counsel>
<Claims Adjuster>

VI. INITIAL INTERVIEW FORM
(REVISED)

Department of Industrial Accidents
Office of Education and Vocational Rehabilitation

INITIAL INTERVIEW

DATE: _____ **DIA#**_____

REVIEW OFFICER:_____ **INJURY DATE:**_____

EMPLOYEE:_____ **INSURER:**_____

ADDRESS:_____ ADDRESS:_____

_____ _____

DATE OF BIRTH:_____ ADJUSTER:_____
SEX:_____
PHONE #:_____ PHONE #:_____
DEPENDENTS:_____
SS#_____ TYPE OF INJURY_____
MARITAL STATUS: S M D W

A.W.W._____
ATTORNEY:_____ COMP RATE:_____
ADDRESS:_____ REFERRAL DATE:_____
PHONE #_____ REFERRAL SOURCE:A D I P S V
LIABILITY ESTABLISHED: Y N

EMPLOYMENT HISTORY:

EMPLOYER	JOB TITLE	DATES

EDUCATION/TRAINING LEVEL: N G J H T A C M D

CURRENT MEDICAL STATUS: (diagnosis, treating physician, recent hospitalization, medications, therapy, prognosis.) 1 2 3 4 5

PAST MEDICAL HISTORY (if any)

PROBLEMS WITH ALCOHOL OR DRUGS:_____

APPEARANCE:_____

STRENGTHS and WEAKNESS (Transferable Skills):

FUNCTIONAL LIMITATIONS: (cognitive, vision, communication, motor function.)

B C D E H I L_____

M P R S T W O_____

_____

_____

_____

_____

CASE DISPOSITION: [ ] OPEN [ ] CLOSED

STATUS OF CLAIM(S)

BOARD NO.	LIABILITY ESTABLISHED	SUSPENSION/or REDUCTION	DISPOSITION
a._____	_____	_____	_____
b. _____	_____	_____	_____

If there are additional board numbers please attach a separate sheet.

_____A. Suitable for rehabilitation plan development, (liability established).

_____B. Not suitable due to:

1. _____Not medically released to seek work
2. _____Other (specify)_____

_____

C. Unable to determine suitability

1. Need further medical_____
2. Need further vocational information_____

_____

REGIONAL REHABILITATION REVIEW OFFICER NOTES (Attached)

VII. DETERMINATION OF SUITABILITY FORM (D.O.S.)

THE COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

OFFICE OF EDUCATION AND VOCATIONAL REHABILITATION

DETERMINATION OF SUITABILITY DECISION

EMPLOYEE_____INITIAL INTERVIEW DATE_____
BOARD NUMBER_____INSURER_____

1. An initial interview has been conducted pursuant to G.L. c. 152, §§ 30G, 30H ; 452 Code Mass. Regs. § 4.05(1), (2), on the necessity and feasibility of vocational rehabilitation. See 452 Code Mass. Regs. § 4.06.

   The decision as to suitability for services is as follows:

_____**A**. The employee has been deemed **SUITABLE** for vocational rehabilitation services and has been informed of all requirements regarding his or her participation.

_____Lump-sum settlement provides for ongoing vocational rehabilitation services per §§ 30G, 30H or the employee, post settlement, is within the two year window of eligibility to request services per § 48.

_____**B.** The employee has been deemed **NOT SUITABLE** for vocational rehabilitation services for the following reason(s):

[ ] 1. Liability for a workers' compensation claim has not been established;

[ ] 2. _____eligibility for vocational rehabilitation has expired (2 years post lump-sum settlement); or
_____was redeemed by lump-sum settlement (pre-Nov. 1, 1986);

[ ] 3. No substantial functional limitations demonstrated;

[ ] 4. Present medical condition precludes services;

[ ] 5. Provisions of reasonably necessary vocational rehabilitation benefits resulting in a predictable return to suitable employment is not feasible;

[ ] 6. Other_____.

_____**C.** The employee's suitability **CANNOT BE DETERMINED** without further assessment.
Vocational_____ Medical _____ Referred to insurer on_____.

COMMENTS:_____
_____
_____
_____

2. **A.** Pursuant to G.L. c. 152, § 45, the insurer may refer the employee to OEVR every six months for re-evaluation. The employee may self refer whenever there has been a change in medical or vocational status
   B. If the employee/insurer is aggrieved of this determination, they have the right to appeal to the Commissioner pursuant to G.L. c. 152, § 30H.

_____ _____
REHABILITATION REVIEW OFFICER DATE

VIII. IWRP FORM

Department of Industrial Accidents
600 Washington Street - Seventh Floor
Boston, Massachusetts 02111

INDIVIDUAL WRITTEN REHABILITATION PROGRAM

Client Name: _____ V.R. Provider: _____

Street Address: _____ Street Address: _____

City, State, Zip Code: _____ State, Zip Code: _____

_____ Phone Number: _____

Phone Number: _____ V.R. Counselor: _____

Date of Birth: _____ Insurer: _____

Pre-injury Wage: _____ Claim Representative _____

Vocational Goal: _____ Phone Number: _____

DOT Code: _____ Date of Injury: _____

FUNCTIONAL LIMITATIONS: (with supporting documentation; i.e.- physical capacity eval)

_____

_____

[1,3,4,5,] [2] [6] [6]

LEVEL OF SERVICE: Employment Goal: (i.e. - job placement, job modification, OJT, training)

_____

_____

_____

Vocational Services Planned:	From	To	Estimated Cost
Vocational Counseling and Guidance	_____	_____	$_____
Job Seeking Skills Training (includ. resume prep.)	_____	_____	$_____
Transferable Skills.	_____	_____	$_____
Job Modification (former ER)	_____	_____	$_____
Vocational Training (including formal classes)	_____	_____	$_____
On the Job Training	_____	_____	$_____
Job development & Placement	_____	_____	$_____
Post-placement Follow-up	_____	_____	$_____
Transportation	_____	_____	$_____

Plan Completion Date: _____

Total Estimated Cost $_____

PROGRAM JUSTIFICATION: (Include a comprehensive case analysis of the injured worker, including such things as possible obstacles to rehabilitation, financial and family concerns, level of motivation, personal interests and avocations, and the necessary ingredients for a successful placement. Include injury restrictions, new job goal, why goal is appropriate, expected placement, salary and growth, injured worker's responsibilities, and VR provider responsibilities).

EMPLOYEE'S RESPONSIBILITY: I will cooperate and make a good faith effort with all parties involved in my rehabilitation program. This includes the keeping of all appointments and adherence to reasonable requests. I understand that any aspect of my plan can be amended with good reason.

Signed_____ Date_____

CERTIFIED VR PROVIDER'S RESPONSIBILITY: I will be responsible for the timely delivery of the above services and agree to carry out my professional duties in the interest of the employee's rehabilitation. I understand this plan cannot be implemented without OEVR approval. Should timelines or costs change in this plan, I will notify the key parties and develop a plan amendment.

Signed_____ Date_____

EMPLOYER/INSURER'S RESPONSIBILITY: I agree with my responsibility to pay for all reasonable and necessary VR services, and to monitor the cost and timeliness of services.

Signed_____ Date_____

OEVR RESPONSIBILITY: I will monitor the delivery of VR services to insure compliance with regulations and policy, insure cost-effectiveness and quality of services. I agree to conduct team meetings to resolve any conflicts/issues amongst key parties during or about VR in a fair, objective and timely manner.

Signed_____ Date_____

Form 152

The Commonwealth of Massachusetts
Department of Industrial Accidents
600 Washington Street – 7th Floor, Boston, Massachusetts 02111
Info Line (800)323-3249 ext. 470 in Mass. Outside Mass. – (617) 727-4900 ext. 470
http://www.state.ma.us/dia

DIA Board # (If Known):

IX. AMENDMENT/SUSPENSION OR CLOSURE OF VOCATIONAL REHABILITATION PLAN

✓ ***Check One*:** **AMENDMENT** ☐ **SUSPENSION** ☐ **CLOSURE** ☐

Employee: _____ DIA Board #:_____

StreetAddress:_____

Adjuster:_____Tel. Number:_____

VR Provider:_____

Address:_____

VR Specialist: _____ Tel. Number: _____

Vocational Goal:_____ DOT Code: _____

Complete the following if you are AMENDING OR SUSPENDING the VR plan:

1.Reason for Amendment/Suspension:_____

_____

2. Proposed Amendment to Plan (attach other sheet if needed): _____

_____

_____

3. Additional VR Services and costs that are required:

SERVICES	FROM	TO	ESTIMATED COST
_____	_____	_____	**$**_____
_____	_____	_____	**$**_____

SIGNATURES

Employee's Signature: _____ Date: _____

VR Specialist: _____ Date: _____

Insurer's Rep: _____ Date: _____

OEVR Rehab Review Officer:_____ Date: _____

Complete the following if you are CLOSING the Rehabilitation Plan:

Complete the following if the employee is working:

_____ Returned to Work with same employer, modified job.

_____ Returned to Work with same employer, different job.

_____ Returned to Work with different employer, similar job.

_____ Returned to Work with different employer, different job.

_____ Retrained, Returned to Work with same employer.

_____ Retrained, Returned to Work with different employer.

If employer is different from former employer, please complete the following:

Employer Name:
_____

Address:_____

_____

Return to Work Date: _____ Hourly Wage $_____ AWW $_____

Has Employee been continuously employed for 60 days: **Yes** ☐ **No** ☐

Occupational Title: _____ DOT Code:
_____

VR Provider Expenses (voc. Testing, TSA, C & G, etc.):
$_____

Other VR expenses (tuition, fees, B/S, transportation, etc.):
$_____

Total VR Costs: $_____

REASON FOR CLOSURE (check all that apply): **CLOSURE DATE: _____**

1. _____ Medical condition precludes rehabilitation
2. _____ Not likely to benefit from further rehabilitation
3. _____ RTW on own accord prior to finalized IWRP
4. _____ Retired or deceased
5. _____ IWRP services completed w/o RTW - Plan expired
7. _____ Employee is Relocating
8. _____ Non-cooperation.
9. _____ Other (explain) _____

_____

_____

Note: Upon completion of form, please sign on the front!

X. OEVR CONSENT TO LUMP SUM (REVISED)

MEMORANDUM

To: Director, OEVR

Regional Office:

	Case Status	**IWRP Status**
Re:	Open_____	Closed_____
	Closed____	None_____
	Pending___	Completion____
	RTW_____	Goal Date_____

DIA#

LSC:

Reviewed by R.O.: _____YES _____NO

RRO Name: _____

COMMENTS AND ISSUES: Consent to lump sum settle a case without an IWRP should be rarely granted. If you decide a case should be so allowed, please state detailed reasons below.

CONSENT BY DIRECTOR, OEVR: _____YES _____NO

XI. CIRCULAR LETTER ON LUMP SUM PROCEDURES

CIRCULAR LETTER NO. 305

OFFICE OF EDUCATION AND VOCATIONAL REHABILITATION

TO: ALL INTERESTED PERSONS SERVING AS LEGAL REPRESENTATIVES TO PARTIES IN PROCEEDINGS BEFORE THE INDUSTRIAL ACCIDENT BOARD

RE: OEVR CONSENT TO LUMP SUM SETTLEMENTS

DATE: May 24, 2001

Please be advised that 452 Code Mass. Regs. § 4.10 states "where an injured employee who has been deemed suitable for vocational rehabilitation services by" the Office of Education and Vocational Rehabilitation (OEVR) "and has not completed an appropriate rehabilitation program requests the consent of OEVR to a proposed lump sum settlement, a letter must be submitted to the Director of OEVR at least **two weeks** prior to the lump sum conference." The letter is to include the employee's name, DIA board number, date and region of lump sum conference, and reason why a review for consent is being requested.

In considering a grant of consent to settle, OEVR will continue to be guided by its mission of promoting the restoration of injured employees to suitable employment.

This requirement, along with other pertinent information, has been previously publicized by this office in the attached memorandum (first issued on February 1, 1993 and subsequently re-issued August 24, 1994, and again with amendments, on May 24, 2001).

If the insurer has agreed to provide further vocational rehabilitation services, pursuant to an Individualized Written Rehabilitation Plan (IWRP), this agreement should also be incorporated in the lump sum settlement papers, by reference in the narrative of the settlement document. Please note that, regardless of whether an employee intends to pursue vocational rehabilitation services or not, any alleged waiver by the employee of such rights directly contravenes the statute and should not appear on any documentation relative to a lump sum agreement. G.L. c. 152, § 48(2).

So that OEVR may be able to service all parties effectively and professionally, every effort will be made to adhere to these requirements.

Current information regarding the status of lump sum suitability determinations and departmental records of liens can be obtained by contacting the Disability Analyst supervisor at (617) 727-4900 x 268.

MEM0RANDUM

TO: ALL INTERESTED PARTIES
FROM: ROBERT DEMETRIO, OEVR DIRECTOR
DATE: May 24, 2001

Procedure For Lump Sum
INTERACTION WITH OEVR (Form 116B)

PART A

When an employee has been **deemed suitable** by the Office of Education and Vocational Rehabilitation (OEVR), s/he is considered eligible for services and **WILL NEED CONSENT (form 116B, addendum to lump sum approval)** from the Director of OEVR to lump sum the case. See G.L. c. 152, §§ 48(3), 30G; 452 Code Mass. Regs. § 4.10.

Please submit a letter at least **2 weeks** prior to the lump sum conference that includes the following information:

1. The employee's name;
2. The Department board number;
3. The date of lump sum conference;
4. The region of lump sum conference;
5. The reason(s) as to why a review for consent is being requested. (To state that your client simply wants to settle is not sufficient).

See 452 Code Mass. Regs. § 4.10.

The Director of OEVR determines if a consent is warranted on a case by case basis.

NOTE: You can confirm the employee's vocational rehabilitation status with the Disability Analyst at OEVR prior to the lump sum conference.

PART B

A written consent from OEVR is **NOT** required as a condition precedent to the lump sum agreement if any one of the following five apply:

1. No determination has been made with respect to the employee's suitability for vocational rehabilitation, pursuant to G.L. c. 152, § 30G;
2. The employee has been found not suitable by OEVR, pursuant to G.L. c. 152, § 30G;
3. The employee has returned to continuous employment for a period of six or more months, pursuant to G.L. c. 152, § 48(3);
4. The employee has completed an approved individualized vocational rehabilitation plan (IWRP), pursuant to G.L. c. 152, § 48(3);
5. If the lump sum settlement has been reached with no liability established.

If **PART A** above applies, you must have the signature of the OEVR Director on the form 116B or you must obtain an order or decision from an administrative judge or administrative law judge. See G.L. c. 152, § 48(3).

If **PART B** above applies, you need only check the proper box on the form 116B, confirmed by OEVR, and then execute the document as indicated. See G.L. c. 152, §§ 48(3), 30G. Thereafter, the employee may seek vocational rehabilitation within two (2) years of the perfection of the lump sum settlement. See G.L. c. 152, § 48(2).

PART C

In settling the case, "said agreement shall not redeem liability for the payment of medical benefits or vocational rehabilitation benefits with respect to such injury." G.L. c. 152, § 48(2).

"Any employee who receives an amount in violation of this paragraph shall have the right to re-open his or her claim for compensation." G.L. c. 152, § 48(3) (i.e., without OEVR consent).

FORM 116B MUST BE EXECUTED FOR THE LUMP SUM PAPERS TO BE COMPLETE ONLY FOR INJURIES AFTER NOVEMBER 1, 1986.

X11. FORM 116B (LUMP SUMS)
(REVISED)

Form 116B

The Commonwealth of Massachusetts
Department of Industrial Accidents – Department 116B
600 Washington Street – 7th Floor, Boston, Massachusetts 02111
Info. Line (800) 323-3249 ext. 470 in Mass. Outside Mass. - (617) 727-4900 ext. 470
http://www.state.ma.us/dia

DIA Board #
(If Known):

ADDENDUM TO LUMP SUM SETTLEMENT AGREEMENT PURSUANT TO M.G.L. c. 398 § 75 OF THE ACTS OF 1991, EFFECTIVE DECEMBER 24, 1991 - VOCATIONAL REHABILITATION STATUS

Employee Name:_____ **Board #:**_____

PART A

Written consent of the Office of Education and Vocational Rehabilitation is not required as a condition precedent to the validity of the lump sum agreement where:

PLEASE CHECK ONE:

☐ **No determination has been made with respect to the employee's suitability for vocational rehabilitation pursuant to G.L. c. 152, § 30G.**

☐ **The employee has been found unsuitable by the Office of Education and Vocational Rehabilitation for vocational rehabilitation pursuant to G.L. c. 152, § 30G.**

☐ **The employee has returned to continuous employment for a period of six months or more.**

☐ **The employee has completed an approved rehabilitation plan.**

Signed this _____ day of _____ 20___.

SIGNATURE **ADDRESS**

_____ _____

CLAIMANT

_____ _____

CLAIMANT'S COUNSEL

_____ _____

INSURER'S COUNSEL

PART B

Where the employee has been found suitable for vocational rehabilitation services pursuant to G.L. c. 152, § 30G and has not returned to continuous employment for a period of six or more months or completed an approved rehabilitation plan, the Office of Education and Vocational Rehabilitation may nevertheless consent in writing to the lump sum, or an administrative judge or administrative law judge, by order or decision may authorize such agreement. G.L. c. 152, § 48 (3). "Any employee who receives a [lump sum] amount in violation of [§ 48(3)] shall have the right to re-open his or her claim for compensation." Id.

PART C

Please note that when liability is established, a lump sum agreement shall not redeem liability for the payment of medical benefits or vocational rehabilitation benefits with respect to such injury. An employee may seek vocational rehabilitation within two (2) years of perfection of the lump sum settlement. G.L. c. 152, § 48 (2).

Consented to:_____ **Date:**_____

Office of Education and Vocational Rehabilitation

OEVR Comments: _____

_____

_____

Order/Decision: _____

Administrative Judge/Administrative Law Judge

Reproduce as needed **FORM 116B Revised 7/2001**

XIII. OEVR DETERMINATION FORM PURSUANT TO G.L. c. 152, § 30 (PAR. 4)

(NEW)

Name
Address
City, State, Zip

Date:

Employee:
Employer:
Insurer:
D.I.A. #:

OEVR DETERMINATION PURSUANT TO § 30 (PAR. 4)

This request for a mechanical device/appliance/artificial eye or limb came before me for review under the provisions of G.L. c.152, § 30 (par. 4) on _____at _____Massachusetts. The claimant was represented by_____, and the insurer was represented by _____. The vocational provider_____and the claims adjuster_____ _____also attended.

Based on the information submitted by the parties, it has been determined the employee needs _____ as it will promote his/her restoration to or continue him/her in industry. These § 30 devices are required specifically, because_____ _____ _____ _____

Any party has the right to file a claim to contest this determination within fourteen days from the filing date of same, pursuant to § 30, with the division of dispute resolution. Such claim shall be filed with the Department of Industrial Accidents, 600 Washington Street, Boston, MA 02111.

_____
Rehabilitation Review Coordinator
Department of Industrial Accidents
for the Office of Education and
Vocational Rehabilitation

cc:

XIV. FORM 131
REQUEST FOR SPEEDY CONFERENCE BECAUSE OF HARDSHIP

THIS FORM CAN BE OBTAINED ON THE DIA WEB SITE AT:

www.mass.gov/dia

XV. FORM 132
AFFIDAVIT IN SUPPORT OF EMPLOYEE'S REQUEST FOR SPEEDY CONFERENCE BECAUSE OF HARDSHIP

THIS FORM CAN BE OBTAINED ON THE DIA WEB SITE AT:

www.mass.gov/dia

XV. VR INFORMATION CHECKLIST

Required information for VR Interview

Copy of ALL DIA impartial exams, if any_____ ☐

Copy of ALL MRI reports, if any (not the actual MRI Films)*_____ ☐

Copy of ALL CAT Scans, if any (not the actual CT Scan Films)*_____ ☐

Copy of ALL X-ray reports, if any (not the actual X-ray Films)*_____ ☐

Copy of ALL EMG reports, if any (not the actual EMG films)*_____ ☐

Copy of Physical Therapy discharge report, if any_____ ☐

Copy of Physical Therapy reports, if any, from_____**to**_____ ☐

Copies of your Doctors reports from_____**to**_____ ☐

Copies of all IME reports from_____**to**_____ ☐

Copy of lump sum agreement_____ ☐

Complete name and address of Insurance Co._____ ☐

Name and phone numer of claims Adjuster_____ ☐

Other_____ ☐

_____

_____

On the date of your interview, please bring with you to the **Mandatory Meeting** the above requested information which has been **checked off**.
Bring this form to your attorney who will provide you with the required information. It is **your** responsibility to insure that each item requested has been provided to you, if available.
***Do not* have the information mailed to the D.I.A.**

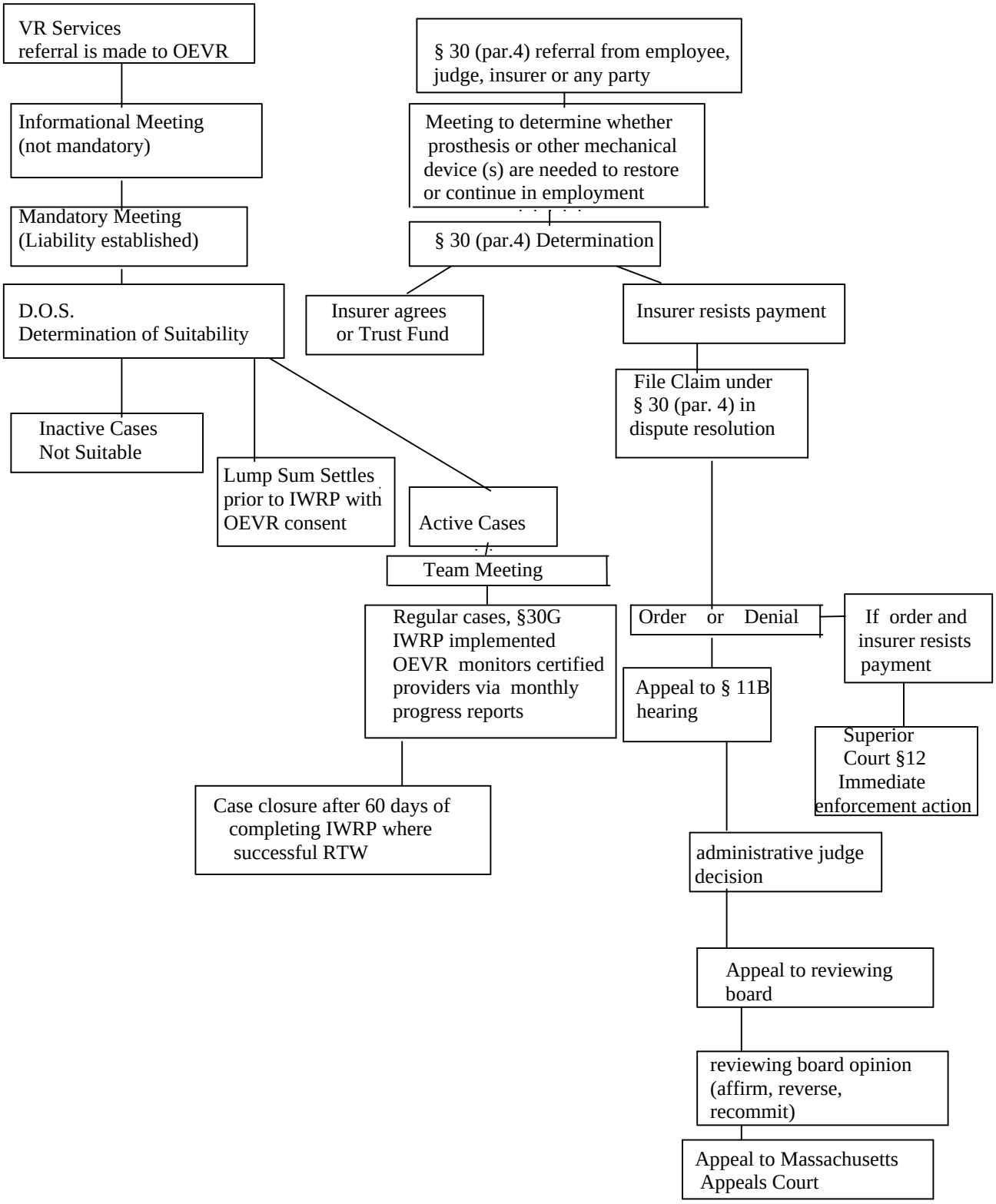
_____
Regional Rehabilitation Review Officer

The actual film is not required at the meeting, only the report

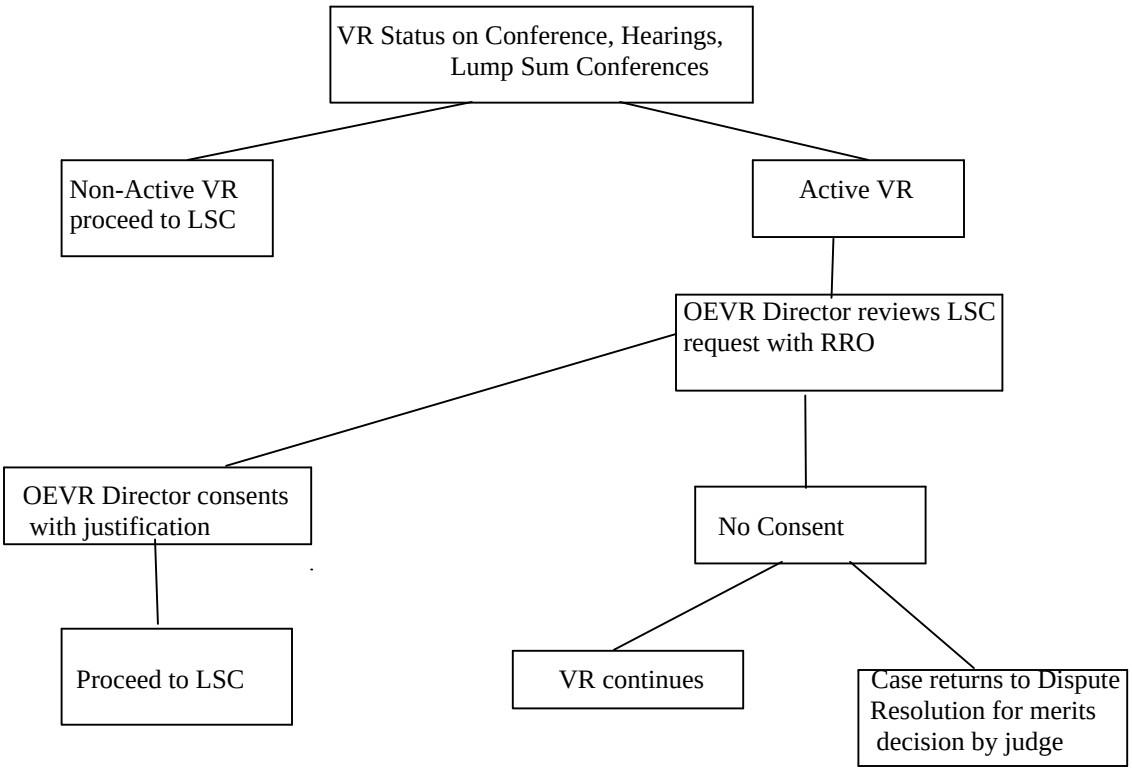
3. FLOW CHARTS

TABLE OF CONTENTS

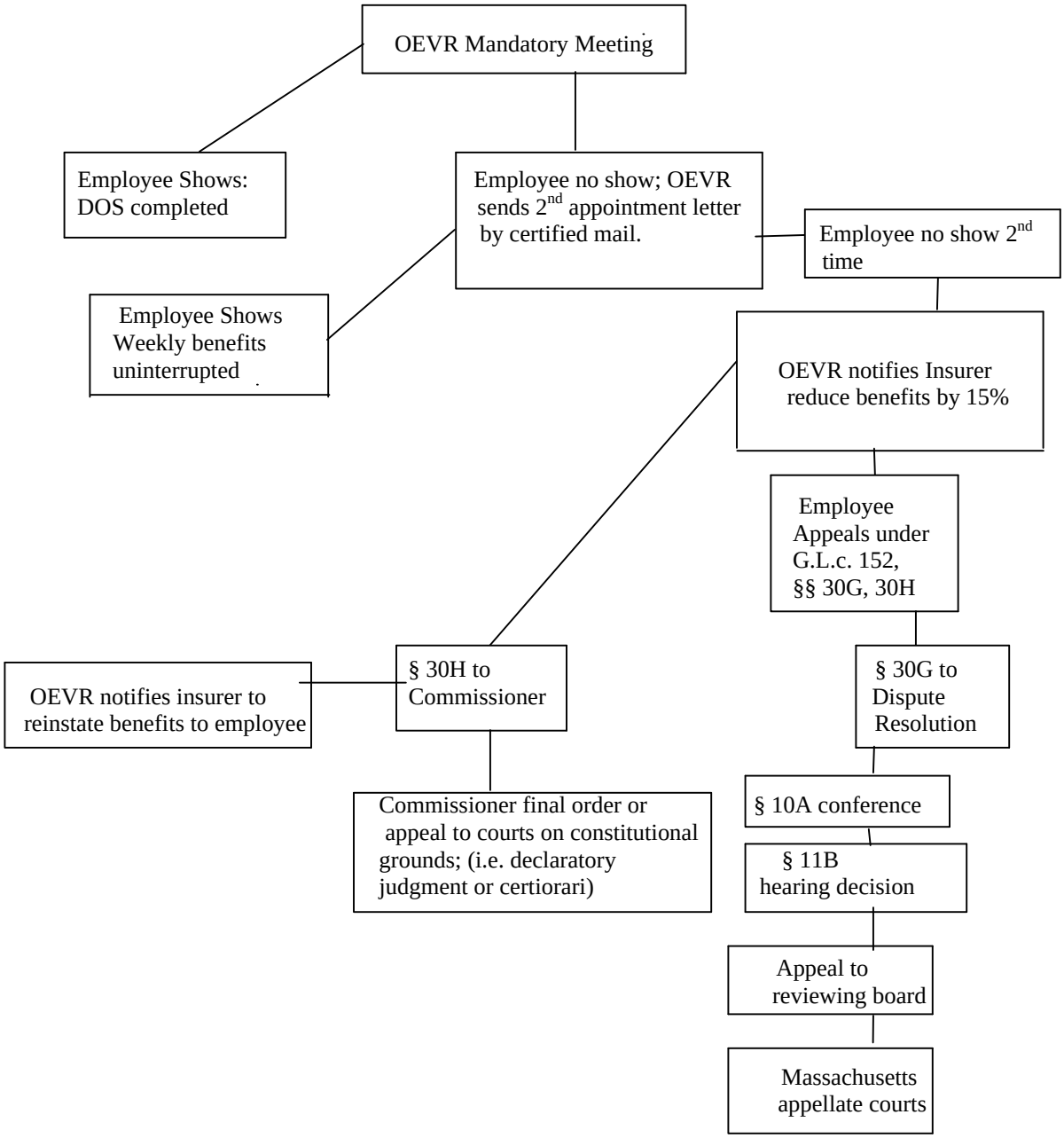
I. FLOW CHART OF INTERACTION BETWEEN OEVR AND DISPUTE RESOLUTION



FLOW CHART OF
II. OEVR INTERACTION WITH DISPUTE RESOLUTION IN LUMP SUMS CONFERENCES (LSC)

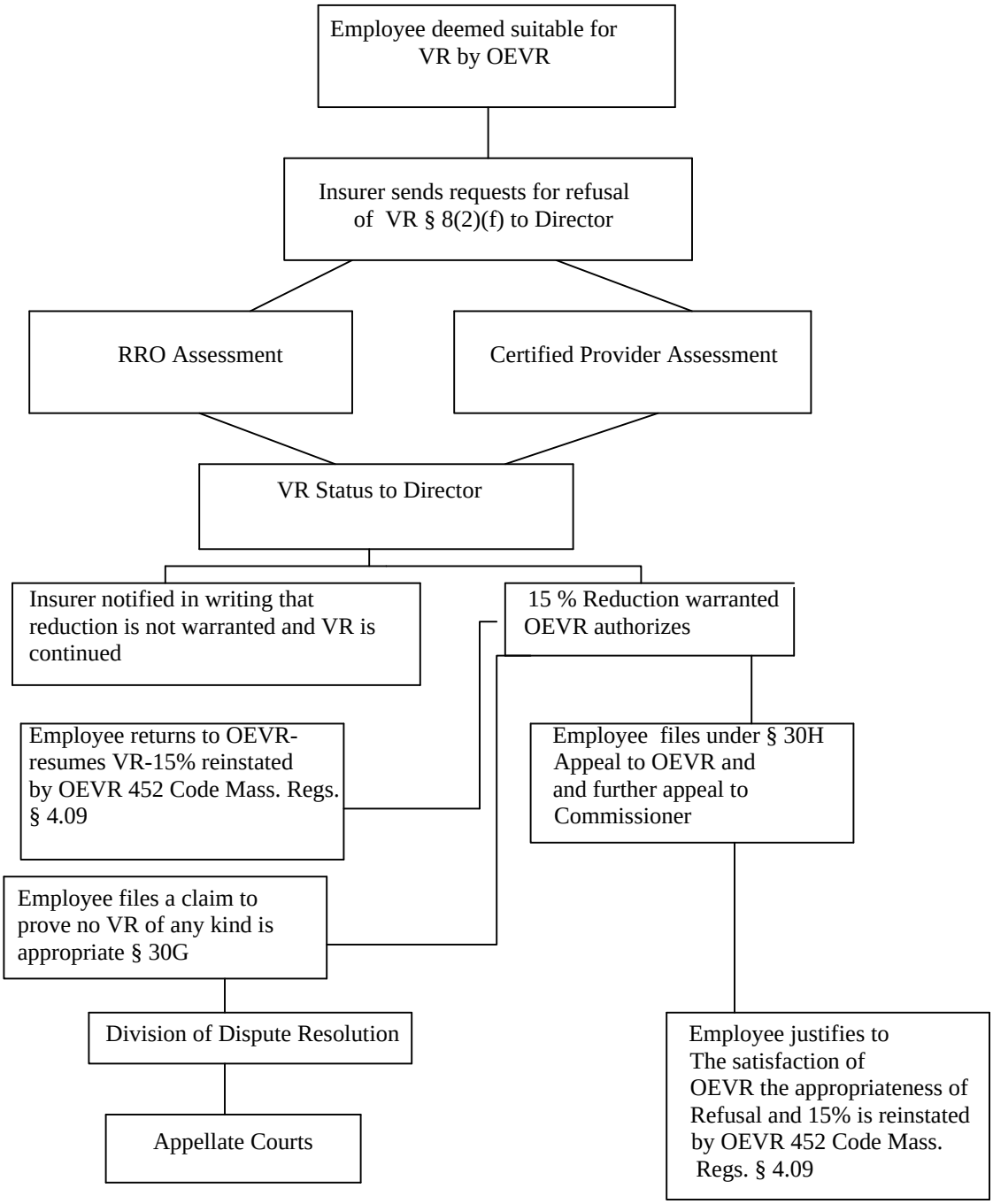


FLOW CHART OF OEVR IMPACT ON
III. RECEIPT OF WEEKLY INDEMNITY BENEFITS
(G.L. c. 152, § 8(2)(F); §§ 30G, 30H)



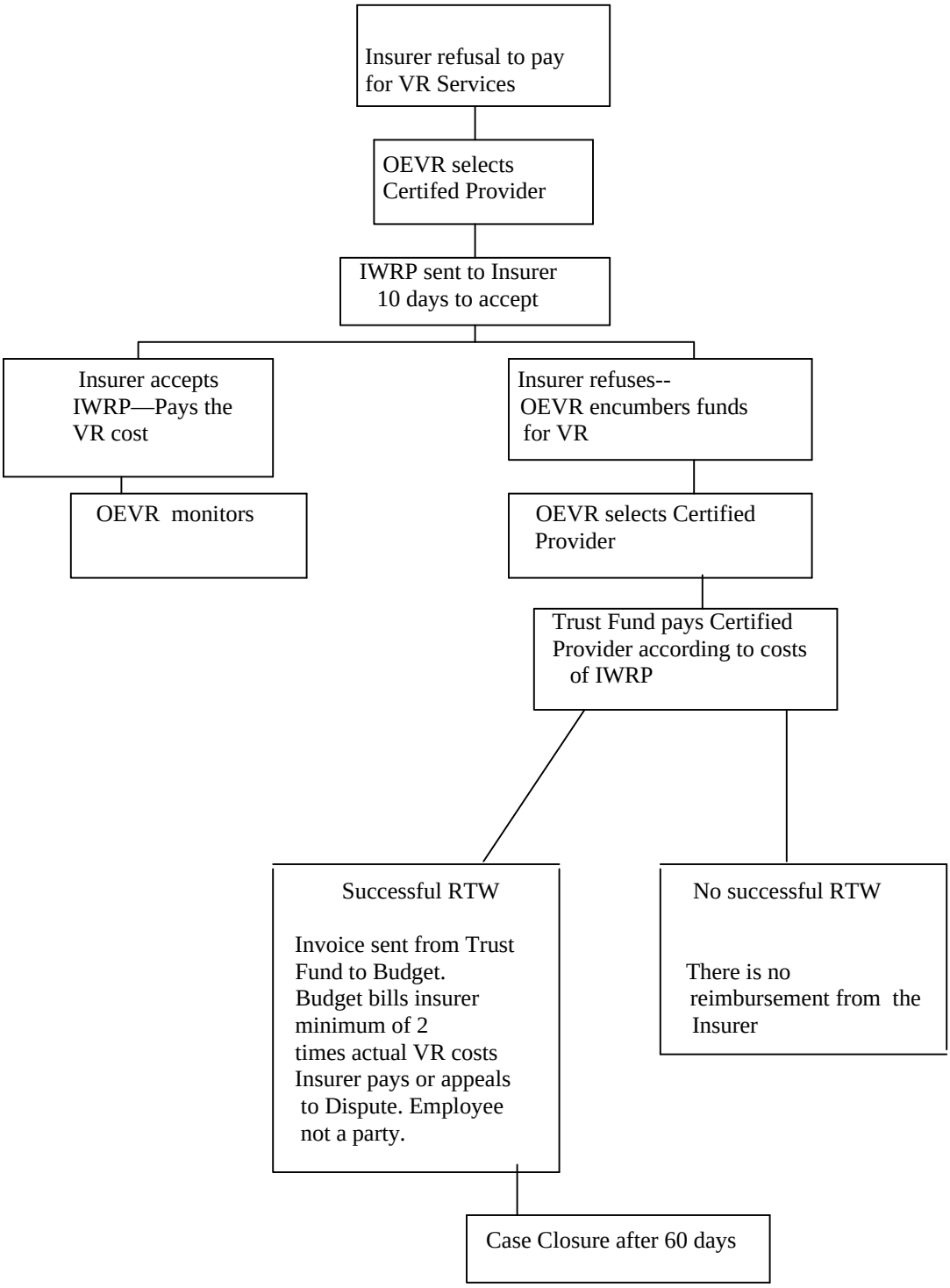
IV. FLOW CHART OF WEEKLY BENEFITS 15% REDUCTIONS

G.L. c. 152, § 30G, as amended by the Acts of 1991; § 30H



V. OEVR INTERACTION WITH TRUST FUND AND BUDGET

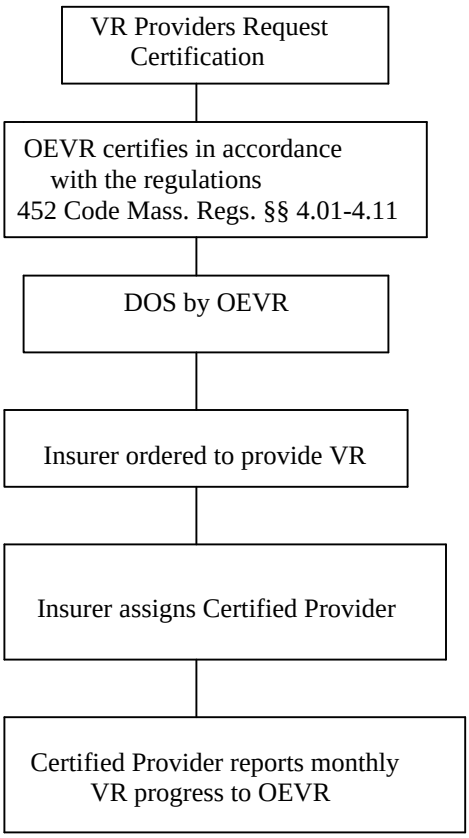
G.L. c. 152, §§ 30H, 65(D)



VI. CERTIFIED PROVIDERS UNDER OEVR

Vocational rehabilitation providers administering services to injured workers are certified by OEVR on an annual basis. The certification process is outlined in 452 Code Mass. Regs. § 4.00.

Providers must adhere to the regulations binding their conduct to remain certified.
See 452 Code Mass. Regs. §§ 4.01-4.11 (pages 54-61). Only those providers certified by OEVR administer VR services to injured workers receive cases that have been deemed suitable.
Providers can now use the DIA web site for information and yearly recertification application.



VII. DISABILITY ANALYST

It is the responsibility of Disability Analysts to assist the Regional Review Officers in expediting the vocational rehabilitation (VR) process.

Functions:

1. Maintain updated VR records by notifying providers of delinquent reports and submitting them accordingly.

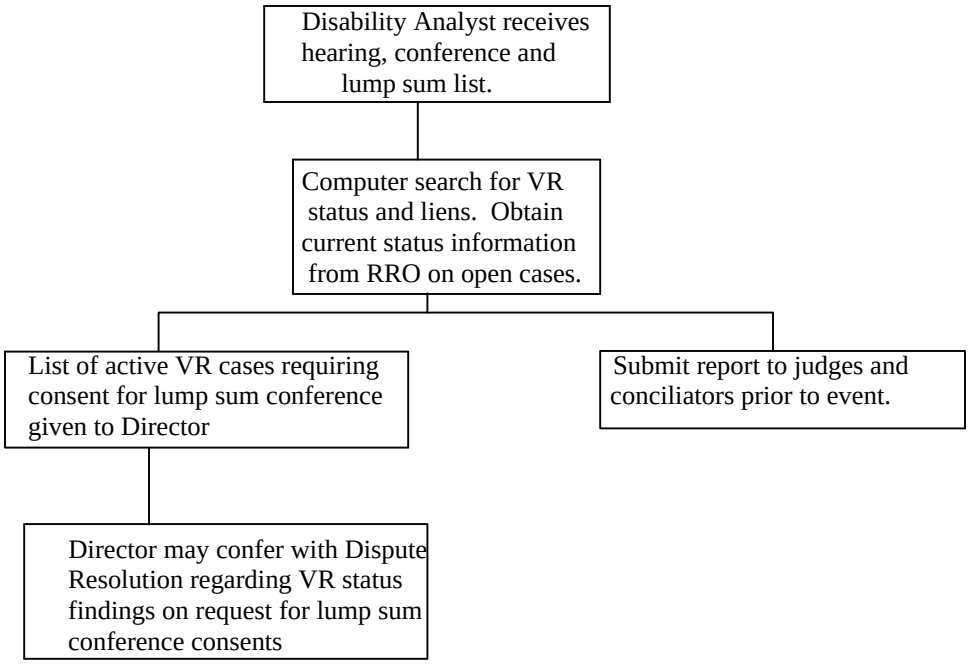
2. Responsible for researching and providing judges and conciliators with VR status on cases prior to conferences and hearings; also notify of third party liens.

3. Complete and submit monthly work logs to supervisor.

4. Inform the Director of OEVR of any VR cases that may be problematic prior to an event.

5. Review VR case status with Director when parties requesting VR consent to a lump sum settlement.

DISABILITY ANALYST WORK FLOW CHART
OEVR INTERACTION WITH DISPUTE



APPENDIX B

REGIONAL REVIEW OFFICERS DUTIES

MEMORANDUM: TO ALL INTERESTED PARTIES

LIST OF REGIONAL REVIEW OFFICERS

DUTIES OF RROs

Rehabilitation Review Officers are required to carry out the following functions:

1. Review all incoming referrals daily and determine appropriate time frame for designating appointments.

2. Conduct informational meetings on employees who are in pay without prejudice status.

3. Conduct mandatory meetings /initial interviews to determine VR suitability for injured workers.

4. Complete a determination of suitability on all employees upon completion of the mandatory meeting and notify all parties of the Determination of Suitability (DOS) decision.

5. Contact insurers to order VR when appropriate and confirm certified provider assignments.

6. Notify insurers to discontinue weekly benefits when an injured worker does not attend a mandatory meeting.

7. Notify the insurer to reinstate when an employee attends the mandatory meeting.

8. Monitor certified VR providers to ensure compliance.

9. Review, approve and monitor rehabilitation plans submitted by certified providers and insurers.

10. Coordinate team meetings of all parties when indicated to ensure suitable VR programs are administered timely and cost-effectively.

11. Work with the director regarding VR consent to lump sums and 15% reductions.

12. Oversee and monitor disbursement of Trust Funds for cost effective Return to Work (RTW) programs when an insurer denies provisions for VR.

13. Determine if an employee needs a prosthesis or other mechanical device to restore or continue him/her in industry. If so, they determine it under G.L.c. 152, § 30 (par.4). See Form, reproduced in Appendix A, Part 3, at 171.

MEMORANDUM:

To: All Interested Parties
Re: Mandatory Meetings
Date: September 5, 2003
From: Robert Demetrio, OEVR Director

Effective September 5, 2003, the Office of Education and Vocational Rehabilitation will be, as is true for all cases tracked through the Division of Dispute Resolution, switching to a computerized automatic scheduling system for conducting mandatory meeting interviews. As of the above date, the previous Regional Review Officer (RRO) Territorial List will be discontinued.

Any referral generated by outside parties should go to the respective region where the case file is being addressed. The RROs in each region will take the referrals on a rotating basis. Walk-ins will be handled in the same way. Regional Review Officers will manually schedule all referrals sent in to respective regions.

DEPARTMENT OF INDUSTRIAL ACCIDENTS
OFFICE OF EDUCATION AND VOCATIONAL REHABILITATION

REHABILITATION REVIEW OFFICERS

BOSTON

600 Washington Street
Boston, MA 02111 (617) 727-4900
Fax: (617) 727-4366

Elizabeth Moltrup	Ext. 266	lizm@dia.state.ma.us
Teresa Rogg	Ext. 270	teresar@dia.state.ma.us
William J. Harney	Ext. 264	

==========

FALL RIVER

30 Third Street
Fall River, MA 02722 (508) 676-3406
Fax: (508) 677-0655; 508-672-8667

Pauline Dowd	Ext. 314	paulined@dia.state.ma.us
Uriel Maranhas	Ext. 310	uriem@dia.state.ma.us

==========

LAWRENCE

11 Lawrence Street
Lawrence, MA 01840 (978) 683-6420
Fax: (978) 683-3137

Karla-Luise Consoli	Ext. 130	karlac@dia.state.ma.us

==========

SPRINGFIELD

436 Dwight Street
Room 105
Springfield, MA 01103 (413) 784-1133
Fax: (413) 784-1138

(Supervisor)		
Edward Bajgier	Ext. 319	edwardb@dia.state.ma.us

==========

WORCESTER

8 Austin Street
Worcester, MA (508) 753-2072
Fax: (508) 798-7822; (508) 753-4780

Kathleen Fleming	Ext. 123	kathyf@dia.state.ma.us
Joseph Dunn	Ext. 116	josephd@dia.state.ma.us

III. APPENDIX C

EXHIBITS

TABLE OF CONTENTS

EXHIBIT I

Date

Name of Insurer
Insurer's Address

Employee: _____
Employer: _____
Insurer: _____
DIA# _____

OEVR DETERMINATION PURSUANT TO § 30 (PAR. 4)

This request for a mechanical device/appliance/artificial eye or limb came before me for review under the provisions of G.L. c.152, § 30 (par. 4) on October 24, 2000 at Boston, Massachusetts. The claimant was represented by _____and the self-insurer was represented by_____, case supervisor. The vocational provider,_____, also attended.

Based on the information submitted by the parties, it has been determined the employee needs a personal computer, a printer scanner, ergonomic furniture and accessories, architectural programming software, graphic programming software and speech recognition software, as it will promote her restoration to or continue her in industry. These § 30 devices are required specifically because, (see exhibit 1 attached).

Any party has the right to file a claim to contest this determination within fourteen days from the filing date of same, pursuant to § 30 with the division of dispute resolution. Such claim shall be filed with the Department of Industrial Accidents, 600 Washington Street, Boston, MA 02111.

_____
Rehabilitation Review Coordinator
Department of Industrial Accidents
for the Office of Education and
Vocational Rehabilitation

Exhibit 1

Rationale for OEVR §30 (par.4) Determination

Client:_____

Reviewing Officer: _____

The client's work related disability results in chronic pain of the shoulders, hands and wrists. The attached functional limitations list includes no repetitive use of her hands bilaterally. (See exhibit 2). The client has extensive education and work experience in the fields of architectural design and drafting. (See exhibit 3 attached). The background of the case is as follows:

1. The client is currently a student at Boston Architectural Center.

2. The Center requires students to be employed while attending school.

3. The client obtained a part time job at DET through the school.

4. Following the injury the pre-injury employer stated that they could not modify her pre-injury job and that no other positions were available.

5. Based on Dr. Rosenthal's October 2, 1995 report, the client is to have a proper desk height, key board setup and computer accessories.

6. Specialized equipment for the disabled will allow the client to continue in school, work part time as required by the school and upon graduation work full time as an architect.

7. When the employee first approached OEVR, her retraining was already being funded by the Massachusetts Rehabilitation Commission.

8. Funding for the client's schooling has been through personal loans and the Massachusetts Rehabilitation Commission.

9. An IWRP was developed and signed by the client and the provider. The insurer has rejected the IWRP. (See exhibit 4 attached).

10. The IWRP addressed only job placement and workplace equipment.

11. The client has exhausted her entitlement to G.L. c.152, § 35 benefits as of June 23, 2000. No claim for benefits is pending. Her vocational rehabilitation benefits continue to be available to her.

12. The estimated cost of necessary equipment is $25,150.

13. If the equipment is not provided, her employability will be greatly decreased. Without it, an otherwise highly skilled worker, may become a candidate for two years of § 34 benefits or extended § 35 benefits, with potential §34A exposure thereafter, due to her work related impairment.

14. The provider and client's research shows that with the § 30 devices ordered, the client has the necessary interest, aptitude, ability (with job modifications), previous work experience, (See exhibit 3 attached), to be restored to industry given the existence of full time work at her present employer's site or at home via telecommunication.

15. The provision of the equipment as recommended by the provider in the IWRP, (See exhibit 4 attached), will return the client to suitable employment at or approaching her pre-injury wage.

EXHIBIT II

ADDENDUM TO LUMP SUM SETTLEMENT AGREEMENT (FORM 116B) WITH COMMENTS

EXHIBIT 1 SAMPLE #1 of 3

Form 116B

The Commonwealth of Massachusetts
Department of Industrial Accidents – Department 116B
600 Washington Street – 7th Floor, Boston, Massachusetts 02111
Info. Line (800) 323-3249 ext. 470 in Mass. Outside Mass. - (617) 727-4900 ext. 470
http://www.state.ma.us/dia

DIA Board #
(If Known):

ADDENDUM TO LUMP SUM SETTLEMENT AGREEMENT PURSUANT TO M.G.L. c. 398 § 75 OF THE ACTS OF 1991, EFFECTIVE DECEMBER 24, 1991 - VOCATIONAL REHABILITATION STATUS

Employee Name:_____ **Board #:**_____

PART A

Written consent of the Office of Education and Vocational Rehabilitation is not required as a condition precedent to the validity of the lump sum agreement where:

PLEASE CHECK ONE:

☐ **No determination has been made with respect to the employee's suitability for vocational rehabilitation pursuant to G.L. c. 152, § 30G.**

☐ **The employee has been found unsuitable by the Office of Education and Vocational Rehabilitation for vocational rehabilitation pursuant to G.L. c. 152, § 30G.**

☐ **The employee has returned to continuous employment for a period of six months or more.**

☐ **The employee has completed an approved rehabilitation plan.**

Signed this _____ day of _____ 20___.

SIGNATURE	**ADDRESS**
_____	_____
CLAIMANT	
_____	_____
CLAIMANT'S COUNSEL	
_____	_____
INSURER'S COUNSEL	

PART B

Where the employee has been found suitable for vocational rehabilitation services pursuant to G.L. c. 152, § 30G and has not returned to continuous employment for a period of six or more months or completed an approved rehabilitation plan, the Office of Education and Vocational Rehabilitation may nevertheless consent in writing to the lump sum, or an administrative judge or administrative law judge, by order or decision may authorize such agreement. G.L. c. 152, § 48 (3). "Any employee who receives a [lump sum] amount in violation of [§ 48(3)] shall have the right to re-open his or her claim for compensation." Id.

PART C

Please note that when liability is established, a lump sum agreement shall not redeem liability for the payment of medical benefits or vocational rehabilitation benefits with respect to such injury. An employee may seek vocational rehabilitation within two (2) years of perfection of the lump sum settlement. G.L. c. 152, § 48 (2).

Consented to:_____ **Date:**_____

Office of Education and Vocational Rehabilitation

OEVR Comments: At present, the employee will pursue his/her own vocational objectives; subject to parts B and C above. Vocational Rehabilitation rights remain intact for a period of two years following the lump sum settlement of the case. G.L. c. 152, § 48(2). Liability for vocational rehabilitation cannot be redeemed. Id.

Order/Decision: _____
Administrative Judge/Administrative Law Judge

Reproduce as needed **FORM 116B Revised 7/2001**

EXHIBIT 1 SAMPLE # 2 OF 3

Form 116B

The Commonwealth of Massachusetts
Department of Industrial Accidents – Department 116B
600 Washington Street – 7th Floor, Boston, Massachusetts 02111
Info. Line (800) 323-3249 ext. 470 in Mass. Outside Mass. - (617) 727-4900 ext. 470
http://www.state.ma.us/dia

DIA Board #
(If Known):

ADDENDUM TO LUMP SUM SETTLEMENT AGREEMENT PURSUANT TO M.G.L. c. 398 § 75 OF THE ACTS OF 1991, EFFECTIVE DECEMBER 24, 1991 - VOCATIONAL REHABILITATION STATUS

Employee Name:_____ Board #:_____

PART A

Written consent of the Office of Education and Vocational Rehabilitation is not required as a condition precedent to the validity of the lump sum agreement where:

PLEASE CHECK ONE:

☐ **No determination has been made with respect to the employee's suitability for vocational rehabilitation pursuant to G.L. c. 152, § 30G.**

☐ **The employee has been found unsuitable by the Office of Education and Vocational Rehabilitation for vocational rehabilitation pursuant to G.L. c. 152, § 30G.**

☐ **The employee has returned to continuous employment for a period of six months or more.**

☐ **The employee has completed an approved rehabilitation plan.**

Signed this _____ day of _____ 20___.

SIGNATURE	**ADDRESS**
_____	_____
CLAIMANT	
_____	_____
CLAIMANT'S COUNSEL	
_____	_____
INSURER'S COUNSEL	

PART B

Where the employee has been found suitable for vocational rehabilitation services pursuant to G.L. c. 152, § 30G and has not returned to continuous employment for a period of six or more months or completed an approved rehabilitation plan, the Office of Education and Vocational Rehabilitation may nevertheless consent in writing to the lump sum, or an administrative judge or administrative law judge, by order or decision may authorize such agreement. G.L. c. 152, § 48 (3). "Any employee who receives a [lump sum] amount in violation of [§ 48(3)] shall have the right to re-open his or her claim for compensation." Id.

PART C

Please note that when liability is established, a lump sum agreement shall not redeem liability for the payment of medical benefits or vocational rehabilitation benefits with respect to such injury. An employee may seek vocational rehabilitation within two (2) years of perfection of the lump sum settlement. G.L. c. 152, § 48 (2).

Consented to:_____ Date:_____

Office of Education and Vocational Rehabilitation

OEVR Comments: The insurer agrees to fund all necessary reasonable services pursuant to the development of an Individual Written Rehabilitation Program (IWRP).

Order/Decision: _____
Administrative Judge/Administrative Law Judge

Reproduce as needed **FORM 116B Revised 7/2001**

EXHIBIT 1 SAMPLE # 3 OF 3

Form 116B

The Commonwealth of Massachusetts
Department of Industrial Accidents – Department 116B
600 Washington Street – 7th Floor, Boston, Massachusetts 02111
Info. Line (800) 323-3249 ext. 470 in Mass. Outside Mass. - (617) 727-4900 ext. 470
http://www.state.ma.us/dia

DIA Board #
(If Known):

ADDENDUM TO LUMP SUM SETTLEMENT AGREEMENT PURSUANT TO M.G.L. c. 398 § 75 OF THE ACTS OF 1991, EFFECTIVE DECEMBER 24, 1991 - VOCATIONAL REHABILITATION STATUS

Employee Name:_____ Board #:_____

PART A

Written consent of the Office of Education and Vocational Rehabilitation is not required as a condition precedent to the validity of the lump sum agreement where:

PLEASE CHECK ONE:

☐ **No determination has been made with respect to the employee's suitability for vocational rehabilitation pursuant to G.L. c. 152, § 30G.**

☐ **The employee has been found unsuitable by the Office of Education and Vocational Rehabilitation for vocational rehabilitation pursuant to G.L. c. 152, § 30G.**

☐ **The employee has returned to continuous employment for a period of six months or more.**

☐ **The employee has completed an approved rehabilitation plan.**

Signed this _____ day of _____ 20___.

SIGNATURE	**ADDRESS**
_____	_____
CLAIMANT	
_____	_____
CLAIMANT'S COUNSEL	
_____	_____
INSURER'S COUNSEL	

PART B

Where the employee has been found suitable for vocational rehabilitation services pursuant to G.L. c. 152, § 30G and has not returned to continuous employment for a period of six or more months or completed an approved rehabilitation plan, the Office of Education and Vocational Rehabilitation may nevertheless consent in writing to the lump sum, or an administrative judge or administrative law judge, by order or decision may authorize such agreement. G.L. c. 152, § 48 (3). "Any employee who receives a [lump sum] amount in violation of [§ 48(3)] shall have the right to re-open his or her claim for compensation." Id.

PART C

Please note that when liability is established, a lump sum agreement shall not redeem liability for the payment of medical benefits or vocational rehabilitation benefits with respect to such injury. An employee may seek vocational rehabilitation within two (2) years of perfection of the lump sum settlement. G.L. c. 152, § 48 (2).

Consented to:_____ Date:_____

Office of Education and Vocational Rehabilitation

OEVR Comments: The insurer agrees to pay for the remainder of the vocational rehabilitation services as outlined in the Individual Written Rehabilitation Program (IWRP) and approved by OEVR. See Lump Sum narrative.

Order/Decision: _____
Administrative Judge/Administrative Law Judge

Reproduce as needed **FORM 116B Revised 7/2001**

EXHIBIT III

FINDINGS AND RULINGS ON RETROACTIVE RESTORATION OF BENEFITS IN APPEAL TO COMMISSIONER UNDER G.L. C. 152, § 30H

MEMORANDUM from DIRECTOR……January, 2002

September 11, 2000

Theodore J. Smart, Esquire
Smart & Long, P.C.
16 Train Street, Suite 107
Jamestown, MA 00113

John Martin, Esquire
[ ]. – HRD Litigation Unit
Two Southern Place
Weston, MA 02114

Re: John Doe – Appeal Seeking Retroactive Reinstatement of 15% Reduction
DIA Board No: 000000-00

Dear Counselors:

Based on the presentation of the parties at the administrative hearings conducted pursuant to G.L. c. 152, § 30H on March 31, 2000 and August 1, 2000 and on the close review of the documentary information submitted subsequent to the above dates, this department finds as follows:

The employer or its assigns conducted itself in the following manner:

1. On or about June 9, 10 or 11, 1994, the employer and its assigns published defamatory personal information to the Peyton Chief of Police in order to prohibit the employees retention of his firearms license. The Chief of Police revoked the permit. The employee appealed the revocation to the Peyton District Court where a judge ordered restoration of the gun license to the employee on August 30, 1994.

2. On or about April 24, 1994 to April 29, 1994, the employer or its assigns published defamatory personal information to the Registry of Motor Vehicles (RMV) in an effort to prevent renewal of the employee's driver's license when the modified job offered to him required a valid driver's license.

3. Following the Team Meeting on June 1, 1994, where a functional capacity evaluation (FCE) was recommended, the employer or its assigns made all allegations accusing the employee and his physician of behaving in a fraudulent fashion, which allegations

were not borne out or substantiated. The employer or its assigns then failed to make the necessary contacts to arrange for the FCE, which was never performed.

4. After a jury trial in the Hampton Superior Court, on April 7, 2000, a verdict was rendered affirming the employee's knowledge and belief, at times relevant to the subject hearings, of the employer or its assigns' threats, intimidation or coercion, by which it interfered, or attempted to interfere, with the employee's exercise or enjoyment of a right secured to him by the laws of the [ ] causing him legal injury and harm. The same said jury found on April 7, 2000, that the employer or its assign maliciously or recklessly published a defamatory document which was false in some rational respect causing a legal injury or harm to the employee.

5. In the March 31, 2000 and the August 1, 2000 proceedings held at the Department, the position of the employee regarding threats, coercion, or intimidation was uncontradicted. There was nothing advanced by the [ ] by way of witness information or documentation to contradict the employee's position under G.L. c. 152.

The employee has demonstrated with substantial evidence, on the record as a whole, that the employer's actions were known by him during the disputed time frame and that such knowledge led him to feel intimidated or harassed by the employer, thereby frustrating his participation in the requirements of the IWRP. Up to and including the November 15, 1994 15% reduction of weekly workers' compensation benefits pursuant to G.L. c. 152, § 30H, the employer conducted investigation, certain particulars of which exceeded the permissible boundaries of an inquiry on whether the employee had the capacity to earn on the open job market. See G.L. c.152, § 35D.

Based on the forgoing administrative findings, the employee's action or inactions did not rise to the level of a refusal of vocational services. See G.L. c.152, § 30G. Thus, the period of 15% reduction of weekly benefits is reversed retroactively. The [ ] shall pay § 35 benefits absent deductions from November 15, 1994 through September 28, 1999, taking credit for that portion of benefits paid.

Sincerely,

_____
James J. Campbell
Commissioner

cc: Carolyn Mahoney, HRD, One Ashburton Place, Boston, MA 02108
Edward Bajgier, Regional Supervisor
John Doe, 2 Boys Street, Peyton, MA 01301
Robert Demetrio, Director/OEVR

MEMORANDUM:

TO: All Interested Parties

RE: Clarification of OEVR Information at time of Lump Sum

Date: January 31, 2002

From: Robert Demetrio, Director, OEVR

It has come to the attention of the Office of Education and Vocational Rehabilitation (OEVR) that on occasion certain counsel are advising their clients to participate in educational retraining without the insurer's agreement and without an Individual Written Rehabilitation Program (IWRP) approved through OEVR. See G.L. c. 152, § 30 H.

Please note insurers are not liable for vocational services absent a voluntary agreement or an approved IWRP. If you advise your client to do vocational rehabilitation without an approved IWRP or voluntary agreement by the insurer, your client will be fully responsible for the cost of those services. To protect your client's rights we ask that all attorneys refrain from such ill advised practices. If you feel your client is deserving of certain rehabilitation services, you have an opportunity to advocate such in the IWRP development process.

Additionally, we note that certain attorneys are inadvertently advising their clients during lump sum proceedings of the "right" to retraining. Please note that there is no automatic right to retraining under G. L. c.152 § 30G. **Employees must be evaluated by OEVR where a determination will be made as to suitability for vocational rehabilitation services.** See G.L. c. 152 §§ 30G,H and Code Mass. Regs. 452 §§ 4.05, 4.06, 4.07. The services range from job placement to retraining. See Don't Settle for Less Document ,(pages 146-148).